

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

FEBRUARY 13, 2020

**MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170**

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OF
NORTH CAROLINA**

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FILED 1 MAY 2018

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JUVENILES—Continued

law section of the form order designating the offense as violent, serious, or minor, necessitating remand for correction given the importance that the record speak the truth. **In re I.W.P., 254.**

Delinquency—disposition—sufficiency of findings and conclusions—The trial court appropriately addressed three of the five factors contained in N.C.G.S. § 7B-2501(c) in its disposition order after adjudicating defendant delinquent, but the order was deficient because it failed to address the remaining two statutory factors. The Court of Appeals was bound to follow prior precedent, despite a deviation in a recent case, to require trial courts to consider all of the statutory factors in disposition orders. **In re I.W.P., 254.**

Delinquency—probation conditions—court’s discretion—delegation of authority—The trial court properly exercised its discretion and did not improperly delegate authority in its disposition order when it directed the court counselor and the juvenile’s parents to implement specific probationary conditions. **In re I.W.P., 254.**

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MOTOR VEHICLES

Driving while impaired—corpus delicti rule—evidence sufficient—The trial court did not err in an impaired driving prosecution by denying defendant’s motion to dismiss based on the corpus delicti rule. A Highway Patrol Trooper was called to the scene of a one-car accident where he found defendant’s vehicle nose down in a ditch and defendant sitting on the tailgate of his vehicle exhibiting signs of intoxication. Defendant told the Trooper that he was the only person in the vehicle and that he had “hit the ditch” after running a stop sign. The State offered sufficient corroborating evidence independent of defendant’s statement that he was the driver of the wrecked vehicle, including that one shoe was found in the truck and that defendant was wearing the other, and that the wreck could not otherwise be explained. **State v. Hines, 358.**

Driving while impaired—probable cause to arrest—An officer had probable cause to arrest defendant for driving while impaired where defendant was speeding, made an abrupt unsafe movement almost resulting in a collision with another vehicle, had alcohol on his breath, had two positive readings on the portable alcohol test, had an open container his car, and admitted to heavy drinking just hours before. **State v. Daniel, 334.**

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Reckless driving to endanger—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss a charge of reckless driving to endanger. The State's evidence satisfied the corpus delicti rule and showed that defendant's single-vehicle accident resulted in both property damage to the vehicle and personal injury to defendant. **State v. Hines, 358.**

PARTIES

Necessary—failure to join—The trial court erred by dismissing plaintiff's claims arising from his termination as a law enforcement officer (after he ran for sheriff) for failure to join a necessary party where defendant never requested joinder of any other parties and the Court of Appeals could not determine from the transcript, record, or order whom the trial court believed to be a necessary party or why they would be necessary even if they were proper. **Lambert v. Town of Sylva, 294.**

SEARCH AND SEIZURE

Search warrant—probable cause—residence—connection between suspect and residence—A warrant application failed to establish probable cause to search a residence for evidence of armed robberies where the only information in the accompanying affidavit connecting the suspect (defendant) to the residence was a statement that defendant was arrested at the location. Nothing suggested that defendant may have stowed incriminating evidence in the residence. **State v. Lewis, 366.**

Search warrant—probable cause—vehicles—A warrant application established probable cause to search two cars for evidence of armed robberies where the accompanying affidavit described witnesses' accounts of four similar robberies and the fact that the two makes and models of the getaway cars were found at the residence where the suspect was arrested. **State v. Lewis, 366.**

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Sufficiency of findings—mitigating factors—consecutive life sentences—The trial court failed to make findings stating the evidence supporting or opposing statutory mitigating factors before imposing two consecutive life sentences without parole. **State v. Santillan, 394.**

WORKERS' COMPENSATION

Average weekly wages—statutory factors—fifth method—The Court of Appeals affirmed the Industrial Commission's calculation of decedent's average weekly wages in an asbestos case where the first four statutory methods of calculation in N.C.G.S. § 97-2 were either inapplicable or would produce an unjust result and the Commission accordingly used the fifth method. **Penegar v. United Parcel Serv., 308.**

WORKERS' COMPENSATION—Continued

Findings—injurious exposure—asbestos—The Industrial Commission's findings that decedent was exposed to asbestos at elevated levels while he was employed with defendant UPS and was injured as a result were supported by competent evidence, including witness testimony that the truck brakes used by UPS during decedent's employment contained asbestos and defendant was exposed daily during the course of his employment. **Penegar v. United Parcel Serv., 308.**

Last injurious exposure—asbestos—subsequent exposure—Where plaintiff (decedent's wife) presented evidence that decedent was injuriously exposed to asbestos during his employment at UPS, and where no evidence was presented that decedent was exposed to asbestos during his subsequent employment, the Industrial Commission's finding that decedent's last injurious exposure occurred during his employment with UPS was supported by competent evidence. In the absence of evidence that an employee was exposed to a hazardous material during subsequent employment, the burden shifts to the employer to produce some evidence of subsequent exposure. **Penegar v. United Parcel Serv., 308.**

Modification of award—by full Commission—average weekly wages—issue not raised by parties—The Industrial Commission had jurisdiction to revise the Deputy Commissioner's calculation of decedent's average weekly wage even though that issue was not raised by either party. **Penegar v. United Parcel Serv., 308.**

SCHEDULE FOR HEARING APPEALS DURING 2019
NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2019:

January 14 and 28

February 11 and 25

March 11 and 25

April 8 and 22

May 6 and 20

June 3

July None Scheduled

August 5 and 19

September 2 (2nd Holiday), 16 and 30

October 14 and 28

November 11 (11th Holiday)

December 2

Opinions will be filed on the first and third Tuesdays of each month.

IN RE I.W.P.

[259 N.C. App. 254 (2018)]

IN THE MATTER OF I.W.P.

No. COA17-94

Filed 1 May 2018

1. Appeal and Error—preservation of issues—waiver—motion to dismiss

In a delinquency action involving a pulled fire alarm at a middle school, defendant waived appellate review of the denial of a motion to dismiss for insufficient evidence by failing to renew his motion at the close of all the evidence. Suspension of the appellate rules to allow review is not appropriate absent an indication of manifest injustice, which cannot be shown where sufficient evidence was presented for each element of a criminal offense.

2. Juveniles—delinquency—adjudication—sufficiency of findings—clerical error

In the order adjudicating defendant delinquent, the trial court made sufficient findings of fact which satisfied the requirements of N.C.G.S. § 7B-2411. However, the trial court made a clerical error by failing to mark the appropriate box in the conclusion of law section of the form order designating the offense as violent, serious, or minor, necessitating remand for correction given the importance that the record speak the truth.

3. Juveniles—delinquency—disposition—sufficiency of findings and conclusions

The trial court appropriately addressed three of the five factors contained in N.C.G.S. § 7B-2501(c) in its disposition order after adjudicating defendant delinquent, but the order was deficient because it failed to address the remaining two statutory factors. The Court of Appeals was bound to follow prior precedent, despite a deviation in a recent case, to require trial courts to consider all of the statutory factors in disposition orders.

4. Juveniles—delinquency—probation conditions—court’s discretion—delegation of authority

The trial court properly exercised its discretion and did not improperly delegate authority in its disposition order when it directed the court counselor and the juvenile’s parents to implement specific probationary conditions.

IN RE I.W.P.

[259 N.C. App. 254 (2018)]

Appeal by juvenile-defendant from order entered 10 August 2016 by Judge Deborah Brown in Alexander County District Court. Heard in the Court of Appeals 21 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Janelle E. Varley, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for the defendant-appellant juvenile.

BERGER, Judge.

Juvenile-defendant, I.W.P. (“Roy”),¹ appeals from the trial court’s order adjudicating him delinquent. Roy contends the trial court erred by (1) denying his motion to dismiss; (2) failing to make proper findings of fact in the adjudication order; (3) failing to make proper findings of fact in the dispositional order; (4) violating N.C. Gen. Stat. § 7B-2501(c); and (5) ordering the chief court counselor to direct him to complete community service. We dismiss in part, affirm in part, and remand in part.

Factual and Procedural Background

On June 8, 2016, a group of students at East Alexander Middle School decided to pull a fire alarm on the last day of school. Roy encouraged W.S. (“Wilson”) several times to pull the fire alarm, which Wilson eventually did that afternoon. After the alarm sounded, Roy, Wilson, and other students ran away. According to the School Resource Officer, activation of the fire alarm resulted in “total chaos,” causing children to be pushed and stepped on while attempting to exit the building. The officer swore out juvenile petitions against Roy and Wilson for disorderly conduct.

On August 10, 2016, an adjudication hearing was held in Alexander County District Court. Wilson testified that Roy and another student asked him four different times during at least two classes to pull the fire alarm. Around noon, Wilson pulled the fire alarm.

At the close of State’s evidence, Roy made a motion to dismiss the charge based upon insufficiency of the evidence. The trial court denied his motion to dismiss. Roy decided to put on evidence and testified in his own defense, denying that he encouraged or forced Wilson to pull the fire alarm. Roy did not renew his motion to dismiss at the close of all of the evidence.

1. Pseudonyms are used throughout to protect the identity of the juveniles and for ease of reading.

IN RE I.W.P.

[259 N.C. App. 254 (2018)]

Roy, who was already on juvenile probation, was adjudicated delinquent by the trial court. At disposition, the trial court continued Roy's prior probationary period, and entered a new dispositional order directing him to complete counseling; follow the counselor's recommendations; comply with a curfew set by his parents or counselor; not associate with anyone or be in any place deemed inappropriate by his parents or counselor; not violate any laws or rules at home; attend school on a regular basis; not possess any controlled substances, alcoholic beverages, or weapons; submit to random drug testing; and perform fifty hours of community service. The trial court also ordered a new probationary period for twelve months from August 10, 2016. The trial court also entered a specific dispositional provision that Roy not associate, assault, harass, or threaten Wilson because of a threat Roy had made. Roy entered notice of appeal in open court.

AnalysisI. Adjudication

Roy contends the trial court erred at the adjudication hearing by failing to grant his motion to dismiss at the close of the State's case-in-chief, and by failing to make sufficient findings of fact to prove he committed disorderly conduct. We affirm.

A. Sufficiency of the Evidence

[1] When denying a motion to dismiss for insufficient evidence, the "court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) of the juvenile[] being the perpetrator of such offense." *In re K.C.*, 226 N.C. App. 452, 456, 742 S.E.2d 239, 242 (2013) (citation, quotation marks, brackets, and ellipses omitted). "The evidence must be such that, when it is viewed in the light most favorable to the State, it is sufficient to raise more than a suspicion or possibility of the respondent's guilt." *Id.* (quoting *In re Walker*, 83 N.C. App. 46, 48, 348 S.E.2d 823, 824 (1986)). "If the evidence raises merely suspicion or conjecture as to either the commission of the offense or the identity of the juvenile as the perpetrator of it, the motion should be allowed." *In re R.D.L.*, 191 N.C. App. 526, 530-31, 664 S.E.2d 71, 73-74 (2008) (citation, internal quotation marks, and brackets omitted).

A defendant must properly preserve issues at trial to permit appellate review. For this court to review purported errors from a trial court's denial of a motion to dismiss for insufficiency of the evidence in criminal cases, a motion to dismiss must be made either at the close of the State's case, or at the close of all of the evidence. N.C.R. App. P. 10(a)(3) (2017).

IN RE I.W.P.

[259 N.C. App. 254 (2018)]

If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action, or for judgment as in case of nonsuit, at the conclusion of all the evidence, irrespective of whether defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action, or for judgment as in case of nonsuit, at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

Id. After putting on evidence, a "defendant may preserve [his] argument for appeal only by renewing the motion at the close of all evidence." *In re Hodge*, 153 N.C. App. 102, 107, 568 S.E.2d 878, 881, *appeal dismissed and disc. review denied*, 356 N.C. 613, 574 S.E.2d 681 (2002).

Here, the trial court denied Roy's motion to dismiss at the close of the State's evidence, finding the State had presented sufficient evidence of disorderly conduct based on the testimony of the School Resource Officer and another student. Roy then presented evidence, but failed to renew his motion to dismiss at the close of all evidence. Thus, Roy failed to preserve this issue for appeal. *See* N.C.R. App. P. 10(a)(3). Roy concedes that his trial counsel did not renew the motion to dismiss at the close of all the evidence, and he has waived appellate review of this assignment of error.

Roy does, however, request this Court to suspend appellate rules and review his argument pursuant to Rule 2. This Court can hear issues not properly preserved pursuant to Rule 2 in order "[t]o prevent manifest injustice to a party . . . upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions." N.C.R. App. P. 2 (2017). "The Supreme Court and this Court have regularly invoked [Rule 2] in order to address challenges to the sufficiency of the evidence to support a conviction." *State v. Gayton-Barbosa*, 197 N.C. App. 129, 134, 676 S.E.2d 586, 590 (2009) (citation omitted). However, Rule 2 "should only be invoked rarely and in exceptional circumstances."

IN RE I.W.P.

[259 N.C. App. 254 (2018)]

Id. at 134, 676 S.E.2d at 589 (citation and internal quotation marks omitted); *see also Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008). Further, “precedent cannot create an automatic right to review via Rule 2. Instead, whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis.” *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 603 (2017).

Notably, our Supreme Court stated invoking Rule 2 “must necessarily be made in light of the *specific circumstances of individual cases and parties*, such as whether substantial rights of an appellant are affected.” *Id.* at 603, 799 S.E.2d at 602 (citation and quotation marks omitted); *see also State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984); *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (“Rule 2 ‘expresses an obvious residual power possessed by any authoritative rule-making body to suspend or vary operation of its published rules in specific cases *where this is necessary to accomplish a fundamental purpose of the rules.*’”(quoting N.C.R. App. P. 2 drafting comm. comment. (1975)).

Here, the State’s evidence tended to show Roy encouraged Wilson to pull the fire alarm several times throughout the school day resulting in chaos on school grounds which endangered students. Roy’s actions “[d]isrupt[ed], disturb[ed] [and] interfere[d] with the teaching of students . . . [and] disturb[ed] the peace, order or discipline” at the middle school. N.C. Gen. Stat. § 14-288.4(6) (2017). Moreover, Roy subsequently harassed Wilson about talking with law enforcement.

Where there is sufficient evidence for each element of a criminal offense, manifest injustice cannot exist and suspension of appellate rules is not justified. We decline to invoke Rule 2 and dismiss Roy’s appeal on this issue.

B. Adjudication Order

[2] Roy next contends the trial court did not make sufficient findings of fact to sustain the delinquency adjudication of disorderly conduct. We disagree.

The General Assembly has established that adjudication orders must contain the following:

If the court finds that the allegations in the petition have been proved as provided in G.S. 7B-2409,² the court shall

2. “The allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt. The allegations in a petition alleging undisciplined behavior shall be proved by clear and convincing evidence.” N.C. Gen. Stat. § 7B-2409 (2017).

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so state in a written order of adjudication, which shall include, but not be limited to, the date of the offense, the misdemeanor or felony classification of the offense, and the date of adjudication.

N.C. Gen. Stat. § 7B-2411 (2017). Section 7B-2411 “does not specifically require that an adjudication order contain appropriate findings of fact.” *In re J.V.J.*, 209 N.C. App. 737, 740, 707 S.E.2d 636, 638 (2011) (citation and internal quotation marks omitted). “Nevertheless, at a minimum, [S]ection 7B-2411 requires a court to state in a written order that the allegations in the petition have been proved beyond a reasonable doubt.” *Id.* (citation, internal quotation marks, and brackets omitted).

The petition against Roy alleged that he was a delinquent juvenile by stating that on June 8, 2016, he

did unlawfully and intentionally disrupt, disturb or interfere with the teaching of students or engage in conduct that disturbed the peace, order or discipline at East Alexander Middle School, a public or private educational institution, or on the grounds adjacent thereto, by encouraging [a] student to pull the fire alarm[.]

Consistent with N.C. Gen. Stat. § 7B-2411, the trial court found that, on June 8, 2016, Roy committed the offense of disorderly conduct and was a delinquent juvenile by “encourage[ing] another student to pull the fire alarm on the last day of class.” The trial court properly classified the offense as a Class 2 misdemeanor, and concluded that Roy was a delinquent juvenile.

The trial court’s adjudication order satisfied Section 7B-2411 because: (1) disorderly conduct was identified as the type of offense; (2) June 8, 2016 was listed as the date of the offense; and (3) July 15, 2016 was listed as the date the petition was filed. Additionally, the adjudication order contained delinquency hearing as the type of proceeding, the judge’s signature, and date and proof of filing. The adjudication order also included a description of Roy’s specific conduct, and made the subsequent conclusion of law indicating delinquency. Therefore, the adjudication order had the necessary requirements set forth in N.C. Gen. Stat. § 7B-2411.

The trial court did, however, make a clerical error by failing to mark the appropriate box in the conclusion of law section of the pre-printed form portion of the order to designate the offense as violent, serious, or minor.

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“A clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination.” *In re J.C.*, 235 N.C. App. 69, 73, 760 S.E.2d 778, 781 (2014), *rev’d on other grounds*, 368 N.C. 89, 772 S.E.2d 465 (2015) (citation and quotation marks omitted). The discovery of a clerical error in the trial court’s order requires this Court to “remand the case to the trial court for correction because of the importance that the record speak the truth.” *Id.* (citation and internal quotation marks omitted).

As stated above, the trial court properly designated the offense as a Class 2 misdemeanor, but simply neglected to mark the appropriate box to again identify the offense in the conclusion of law section. Accordingly, we remand for correction of this clerical error.

II. Disposition

[3] Roy contends the dispositional order fails to comply with N.C. Gen. Stat. §§ 7B-2512(a) and 7B-2501(c). Specifically, Roy argues the trial court failed to consider the dispositional factors listed in Section 7B-2501(c), and the dispositional order as a whole did not contain appropriate findings of fact and conclusions of law. We agree.

At a disposition hearing, the trial court shall enter a dispositional order that seeks to “design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction, including the protection of the public.” N.C. Gen. Stat. § 7B-2500 (2017). The disposition should “(1) [p]romote[] public safety; (2) [e]mphasize[] accountability and responsibility of both the parent, guardian, or custodian and the juvenile for the juvenile’s conduct; and (3) [p]rovide[] the appropriate consequences, treatment, training, and rehabilitation to assist the juvenile toward becoming a nonoffending, responsible, and productive member of the community.” *Id.*; see *In re Brownlee*, 301 N.C. 532, 551, 272 S.E.2d 861, 872-73 (1981).

When entering a dispositional order, “the court may consider written reports or other evidence concerning the needs of the juvenile. The court may consider any evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.” N.C. Gen. Stat. § 7B-2501(a) (2017).

The trial court must comply with the following requirements when entering a dispositional order:

- (a) The dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of

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law. The court shall state with particularity, both orally and in the written order of disposition, the precise terms of the disposition including the kind, duration, and the person who is responsible for carrying out the disposition and the person or agency in whom custody is vested.

(b) The court shall include information at the time of issuing the dispositional order, either orally in court or in writing, on the expunction of juvenile records as provided for in G.S. 7B-3200 that are applicable to the dispositional order.

N.C. Gen. Stat. § 7B-2512(a)-(b) (2017). Further, the trial court

shall select the most appropriate disposition both in terms of kind and duration for the delinquent juvenile. Within the guidelines set forth in G.S. 7B-2508, the court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile, based upon:

- (1) The seriousness of the offense;
- (2) The need to hold the juvenile accountable;
- (3) The importance of protecting the public safety;
- (4) The degree of culpability indicated by the circumstances of the particular case; and
- (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c) (2017).

The plain language of Section 7B-2501(c) compels us to find that a trial court must consider each of the five factors in crafting an appropriate disposition. The General Assembly mandated that trial courts “shall select a disposition” that protects the public and is in the best interest of the juvenile “based upon” consideration of a conjunctive list of factors. *Id.* “It is a common rule of statutory construction that when the conjunctive ‘and’ connects words, phrases or clauses of a statutory sentence, they are to be considered jointly.” *Harrell v. Bowen*, 179 N.C. App. 857, 859, 635 S.E.2d 498, 500 (2006), *aff’d*, 362 N.C. 142, 655 S.E.2d 350 (2008) (citation and quotation marks omitted).

In fact, this Court has previously held the trial court must consider each of the factors in Section 7B-2501(c). *See In re Ferrell*, 162 N.C. App. 175, 177, 589 S.E.2d 894, 895 (2004); *In re V.M.*, 211 N.C. App. 389, 391-92, 712 S.E.2d 213, 215 (2011); *K.C.*, 226 N.C. App. 452, 462, 742 S.E.2d 239,

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246; and *In re G.C.*, 230 N.C. App. 511, 519, 750 S.E.2d 548, 553 (2013). However, this Court recently held, contrary to precedent, that the trial court does not need to consider all of the Section 7B-2501(c) factors when entering a dispositional order. *In re D.E.P.*, ___ N.C. App. ___, ___, 796 S.E.2d 509, 514 (2017). This inconsistency has created a direct conflict in this Court's prior jurisprudence and must be reconciled.

In *Ferrell*, the juvenile appealed from the entry of a dispositional order that removed him from the custody of his mother and placed him in the custody of his father pursuant to Section 7B-2506(1)(b), which allows the trial court to arrange for alternative placements for the juvenile. *Ferrell*, 162 N.C. App. at 176, 589 S.E.2d at 895; *see also* N.C. Gen. Stat. § 7B-2506(1)(b) (2017). On appeal, the juvenile contended the trial court failed to make findings of fact sufficient to support a change in custody. *Ferrell*, 162 N.C. App. at 176, 589 S.E.2d at 895. This Court agreed that the custody transfer "was not supported by appropriate findings of fact in the dispositional order." *Id.* at 177, 589 S.E.2d at 895. Moreover, this Court held that the trial court "based the decision to award custody to the father solely on the juvenile's school absences." *Id.* The trial court did not consider the factors in Section 7B-2501(c). *Id.*

In *V.M.*, the juvenile appealed from the entry of a dispositional order entered from a probation violation pursuant to Section 7B-2510(e), contending that the trial court did not sufficiently consider all of the Section 7B-2501(c) factors when entering the disposition. *V.M.*, 211 N.C. App. at 389-91, 712 S.E.2d at 214-15. This Court held "the trial court must consider" each Section 7B-2501(c) factor and failing to do so amounts to reversible error. *Id.* at 391-92, 712 S.E.2d at 215-16.

In *K.C.*, the juvenile appealed from the entry of a dispositional order pursuant to Sections 7B-2512 and 7B-2501. *K.C.*, 226 N.C. App. at 461-62, 742 S.E.2d at 246. This Court held the trial court "sufficiently addressed the first two [Section 7B-2501(c)] factors required by the statute, [but] the record before this Court does not establish that the trial court considered the last three factors." *Id.* at 463, 742 S.E.2d at 246. This Court remanded the dispositional order to the trial court to consider all Section 7B-2501(c) factors. *Id.*

In *G.C.*, the juvenile appealed from an initial dispositional order entered pursuant to Sections 7B-2512 and 7B-2501. *G.C.*, 230 N.C. App. at 519-20, 750 S.E.2d at 553-54. This Court stated that "trial courts must develop the final disposition by considering five different factors," i.e., the factors listed in Section 7B-2501(c). *Id.* at 519, 750 S.E.2d 553. This Court held that the trial court "adequately addressed all of the § 7B-2501(c) statutory factors." *Id.* at 521, 750 S.E.2d at 555.

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In *D.E.P.*, however, a panel of this Court departed from the plain language of Section 7B-2501(c) and prior decisions of this Court. In that case, the juvenile appealed from a dispositional order that imposed a Level 3 disposition and commitment to a training school because the juvenile had violated probationary conditions pursuant to Section 7B-2510(e) as part of a previous Level 2 disposition from a previous delinquency adjudication. *D.E.P.*, ___ N.C. App. at ___, 796 S.E.2d at 511-12. *D.E.P.* recognized that prior cases had required the trial court to analyze and track each factor found in Section 7B-2501(c) in its dispositional order, but held that the trial court did not need to consider each of the Section 7B-2501(c) factors. *Id.* at ___, 796 S.E.2d at 513-14. The panel stated:

Upon careful review of the statutory language and our prior jurisprudence, we find no support for a conclusion that in every case the “appropriate” findings of fact must make reference to all of the factors listed in N.C. Gen. Stat. § 7B-2501(c), including those factors that were irrelevant to the case or in regard to which no evidence was introduced.

Id. at ___, 796 S.E.2d at 514.

Despite holding that the trial court does not need to engage in an exhaustive discussion of all Section 7B-2501(c) factors, the Court in *D.E.P.* did analyze the appealed dispositional order and held that the trial court did consider all of the Section 7B-2501(c) factors appropriately in that case. *Id.* at ___, 796 S.E.2d at 515-16. Furthermore, *D.E.P.* also held that this Court did not apply *Ferrell* correctly, and that this “mischaracterization of *Ferrell* was repeated in several later cases” holding that the trial court must consider each Section 7B-2501(c) factor. *Id.* at ___, 796 S.E.2d at 513. *G.C.* and *K.C.*, however, were not based on *Ferrell*, but rather this Court’s interpretation of the plain language of Section 7B-2501(c).

More importantly, our Supreme Court has instructed this Court, “[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). *D.E.P.* created a direct conflict in this area of the law by deviating from precedent. “[W]here there is a conflicting line of cases, a panel of this Court should follow the older of those two lines.” *Respass v. Respass*, 232 N.C. App. 611, 625, 754 S.E.2d 691, 701 (2014) (citation and quotation marks

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omitted). Accordingly, *Ferrell, V.M., G.C.*, and *K.C.* are controlling, and we hold that a trial court must consider each of the factors in Section 7B-2501(c) when entering a dispositional order.

The trial court here ordered the following disposition: (1) a term of twelve months' probation; (2) cooperation with a specified community-based program of counseling; (3) fifty hours of community service; (4) curfew as set by parents or the juvenile court counselor; (5) not to associate with persons deemed inappropriate by parents or the juvenile court counselor, including Wilson; and (6) restricted access to particular locations deemed inappropriate by parents or the juvenile court counselor.³ The trial court also incorporated by reference and attachment a Supplemental Order of Conditions of Probation, which addressed further details of Roy's Level 1 Disposition.

While the trial court appropriately addressed three of the Section 7B-2501(c) factors, it did not consider each factor in that section. Section 7B-2501(c)(2) addresses the need to hold the juvenile accountable. Here, the trial court held Roy accountable by imposing a twelve month probationary sentence for this offense, the maximum allowed pursuant to N.C. Gen. Stat. § 7B-2510(c). In addition, the trial court imposed probationary conditions that specifically addressed Section 7B-2501(c)(3) and (5): the need for public safety, and the treatment needs of the juvenile, respectively. The trial court's order of ongoing counseling, curfew and no contact provisions against specified persons directly addressed these factors.

The trial court's order failed to address the two remaining Section 7B-2501(c) factors. Section 7B-2501(c)(1) and (4) require findings that address the seriousness of the offense and the culpability of the juvenile. The form order used here specifically instructs the trial court to list any additional findings regarding the Section 7B-2501(c) factors if they are not found elsewhere in the order or incorporated documents. The supplemental reports and assessments do not address these factors. Accordingly, the dispositional order is deficient, and we remand for further findings of fact to address the seriousness of the offense and the culpability of the juvenile.

III. Improper Delegation of Authority

[4] Roy also contends the trial court impermissibly delegated its authority to the court counselor by not specifying with particularity probation conditions in the supplemental order. We disagree.

3. Specific Level 1 Community Dispositions were entered pursuant to N.C. Gen. Stat. § 7B-2506(3), (6), (8), (10), and (11).

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A court exercising jurisdiction over a juvenile who has been adjudicated delinquent and for whom the dispositional chart in subsection (f) of this section prescribes a Level 1 disposition may provide for evaluation and treatment under G.S. 7B-2502 and for any of the dispositional alternatives contained in subdivisions (1) through (13) and (16) of G.S. 7B-2506.

N.C. Gen. Stat. § 7B-2508(c) (2017). “[T]he court, and the court alone, must determine which dispositional alternatives to utilize with each delinquent juvenile.” *In re Hartsock*, 158 N.C. App. 287, 292, 580 S.E.2d 395, 399 (2003). “[A] judge could order certain dispositional alternatives apply upon the happening of a condition, since *the court*, and not another person or entity, would be exercising its discretion.” *Id.*; see also *In re M.A.B.*, 170 N.C. App. 192, 194-95, 611 S.E.2d 886, 887-88 (2005) (holding the trial court did not improperly delegate its authority because the court itself exercised its discretion when ordering the juvenile “to cooperate and participate in a residential treatment program as directed by court counselor or mental health agency’ ”).

In the case *sub judice*, the trial court did not improperly delegate its authority to a third party. The trial court applied the following community dispositions: (1) probation pursuant to Section 7B-2506(8); (2) counseling pursuant to Section 7B-2506(3); (3) community service pursuant to Section 7B-2506(6); (4) curfew pursuant to Section 7B-2506(10); and (5) no association with particular individuals or places pursuant to Section 7B-2506(11). The trial court selected community dispositions within the allowed subdivisions permitted by the Level 1 designation. Unlike *Hartsock*, here the trial court made the determination that these dispositions are appropriate and did not delegate decisions on whether to enforce them to a third party. Instead, the trial court directed the court counselor and parents to handle the day-to-day implementation of the particular probationary conditions. The trial court exercised its discretion in implementing probationary conditions, and therefore did not impermissibly delegate its authority.

Finally, the trial court specified further conditions of Roy’s probation in the supplemental order incorporated by reference, including the requirement to submit to random drug testing. However, within the supplemental order, the trial court made a clerical error specifying that the probation of twelve months was to terminate on August 10, 2016, instead of August 10, 2017. Accordingly, we remand for this clerical error to be corrected by the trial court.

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Conclusion

For the foregoing reasons, we dismiss the issue regarding sufficiency of the evidence; affirm the adjudication order; affirm the probationary conditions; remand the dispositional order for further findings of fact; and remand for the correction of clerical errors in the adjudication and supplemental orders.

DISMISSED IN PART, AFFIRMED IN PART, AND REMANDED IN PART.

Chief Judge McGEE and Judge DIETZ concur.

TOKISHA M. INGRAM, PLAINTIFF

v.

HENDERSON COUNTY HOSPITAL CORPORATION, INC., D/B/A MARGARET R. PARDEE MEMORIAL HOSPITAL, RYAN CHRISTOPHER DAVIS, M.D., ROBERT C. BOLEMAN, M.D., HENDERSONVILLE EMERGENCY CONSULTANTS, PC, AMY K. RAMSAK, M.D., AND TST MEDICAL, PA., DEFENDANT

No. COA16-1016

Filed 1 May 2018

1. Evidence—expert testimony—continuing objection—objection not waived

Plaintiff, a patient in a medical malpractice action, did not waive her objection to expert testimony regarding three medical studies even though her attorney asked questions about the studies after the continuing objection. Plaintiff was permitted to attempt to limit or avoid any prejudice from the evidence without losing the benefit of the continuing objection.

2. Evidence—expert testimony—medical malpractice—causation—studies published after underlying events

The trial court did not abuse its discretion in a medical malpractice case by allowing expert testimony regarding three studies published several years after the events giving rise to the claims. The studies were relevant to show lack of causation regardless of timing of the treatments or other factors such as differences in the characteristics of the patients. The purpose of the studies was

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to determine the strength of the protocol that plaintiff advocated as the standard of care. Furthermore, the jury was presumed to follow the trial court's limiting instruction.

3. Evidence—expert testimony—medical malpractice—standard of care—sepsis

The trial court did not err in a medical malpractice action by excluding plaintiff's expert's testimony concerning the applicable standard of care for emergency room physicians and physician assistants treating sepsis where plaintiff could not demonstrate prejudice.

4. Medical Malpractice—Rule 9(j) certification—negligence—nursing staff

The trial court's unchallenged findings of fact in a medical malpractice claim against a hospital supported its conclusion of law that a patient's claim for negligence should be dismissed for failure to comply with N.C.G.S. § 1A-1, Rule 9(j) where plaintiff did not identify experts who would offer opinions about nursing care.

5. Appeal and Error—preservation of issues—motion in limine—no additional evidence offered

Plaintiff did not preserve for appeal her objection to a motion in limine limiting and excluding certain testimony in a medical malpractice action where the trial court allowed the hospital's motion and plaintiff did not proffer evidence that she contended should have been allowed.

Appeal by plaintiff from order entered on or about 10 October 2014 by Judge Martin B. McGee and judgment entered on or about 24 February 2016 by Judge Mark E. Powell in Superior Court, Henderson County. Heard in the Court of Appeals 25 May 2017.

Ferguson Chambers & Sumter, P.A., by James E. Ferguson, II, for plaintiff-appellant.

Roberts & Stevens, P.A., by Ann-Patton Hornthal and Phillip T. Jackson, for defendant-appellees Henderson County Hospital Corporation, Inc. d/b/a Margaret R. Pardee Memorial Hospital.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Emma J. Hodson, for defendant-appellees Ryan Christopher Davis, M.D., Robert C. Boleman, M.D., and Hendersonville Emergency Consultants, PC.

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Northup McConnell & Sizemore, PLLC, by Isaac N. Northup, Jr., for defendant-appellees, Amy K. Ramsak, M.D. and TST Medical, PA.

STROUD, Judge.

Plaintiff sued defendants for medical malpractice arising out of the care they provided to her for sepsis. A jury ultimately found all defendants not liable. On appeal, plaintiff contends the trial court erred in several evidentiary rulings and in dismissing her claim arising out of nursing care against defendant Henderson County Hospital Corporation, Inc., d/b/a Margaret R. Pardee Memorial Hospital. After careful review, we affirm.

Many witnesses testified regarding plaintiff's illness, the medical care she received, and the standards of care for the diagnosis and treatment of her condition. This overview of plaintiff's medical care omits many details and is based primarily upon plaintiff's medical records and the testimony of Dr. David P. Milzman, plaintiff's expert witness, who provided the initial summary of the facts to the jury. Defendants disputed the interpretation and meaning of some facts, but for purposes of the issues on appeal, we need not summarize defendants' evidence and contentions.

I. Factual Background

The factual background of plaintiff's case took place over 23 and 24 February 2010.

A. 23 February 2010

Plaintiff, then age 35, went to the emergency room at defendant Henderson County Hospital Corporation, Inc., d/b/a Margaret R. Pardee Memorial Hospital ("Pardee Hospital") on 23 February 2010 at about 9:17 p.m. Plaintiff reported that she had severe pain in her back right side, which she described as at a level of 10 out of 10. Plaintiff also had a fever, nausea, vomiting, fatigue, and shortness of breath. Hospital employees took plaintiff's blood pressure and temperature; plaintiff's heart rate was 103 and her blood pressure was 135/83.

Within about five minutes, plaintiff was seen by defendant Ryan Christopher Davis, M.D. Defendant Davis evaluated plaintiff and noted that she had abdominal cramps, vomiting, and body aches; he noted her pain was mild, even though she had identified her pain as level 10 out of 10 to a nurse a few minutes earlier. Defendant Davis did not note that plaintiff's pain was on her right side and noted no prior surgeries,

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although plaintiff “had had her tubes tied.” Defendant Davis did a physical examination of plaintiff and noted that plaintiff had tenderness but no “guarding and rebound” which would indicate a “really severe abdominal exam.” Defendant Davis did not perform a pelvic examination; he did order two laboratory tests, one to check her urine and “basic chemistries” which shows “kidney function and . . . basic electrolytes, sodium, potassium chloride, serum bicarbonate and sugar.” Defendant Davis prescribed, and plaintiff received, Toradol, an intravenous (“IV”) pain medication; Zofran, for vomiting; and IV fluids.

By about 10:30 p.m., plaintiff’s blood pressure was a little lower but her heart rate was still 103; plaintiff reported her pain as 7 out of 10. Defendant Davis received plaintiff’s lab test results showing her creatinine was slightly elevated and her urine showed a trace of blood and “a little bit of sugar,” and white blood cells. These results usually mean “you are fighting a bacterial infection” and indeed plaintiff’s urine also had “a few bacteria.” Defendant Davis returned to see plaintiff and reexamined her, noting that she felt better. Defendant Davis gave plaintiff an oral antibiotic, Levaquin 500 milligrams, and Vicodin for pain. Defendant Davis diagnosed plaintiff with vomiting and a urinary tract infection. Defendant Davis gave plaintiff prescriptions for Cipro, an oral antibiotic, and Vicodin for pain. Defendant Davis discharged plaintiff by 11:04 p.m.

Plaintiff’s expert witness, Dr. Milzman, testified that Defendant Davis “got a lab result” but “ignored the signs and symptoms” plaintiff reported. Specifically, plaintiff did not report “the most common thing in a urine infection,” burning while urinating nor did she report frequent urination, urgency, or pain in her bladder. Dr. Milzman further testified that if part of plaintiff’s issue was dehydration from vomiting, plaintiff’s heart rate should have dropped some after receiving the IV fluid, but it did not. Plaintiff was still in pain, and “[p]ain that bad, that’s not a urine infection.”

Dr. Milzman opined that Defendant Davis should have kept plaintiff in the hospital until he could get plaintiff’s heart rate under 100 and get better pain relief. Dr. Milzman also testified that Defendant Davis needed to determine why plaintiff’s right side was hurting so much by performing an ultrasound or a CAT scan. In addition, Defendant Davis should have “done a blood count” which may have indicated a high white blood cell count as based on the tests done, the elevated creatinine level could indicate kidney injury. Dr. Milzman ultimately testified that Defendant Davis failed to provide proper care by failing to “recognize the initial and progressive severity” of plaintiff’s condition, failing “to properly evaluate changing values in her condition, including a heart rate and

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her pain complaint,” failing to give her IV antibiotics which would generally get “around faster to the body,” failing to examine her properly on her right side pain, and failing to improve her condition before she was discharged.

B. 24 February 2010

The next day, 24 February 2010, plaintiff returned to Pardee Hospital ER at about 3:36 p.m.¹ A nurse noted plaintiff had a urinary tract infection and hypotension/tachycardia; hypotension is low blood pressure, and tachycardia is a high heart rate. The nurse noted plaintiff as a priority level 2 patient, which is one level higher than she was assigned the night before, but instead of having a physician see plaintiff, hospital personnel sent her to the “walk-in side” of the ER where she was seen by a physician assistant; this would indicate that they believed her condition to be “less emergent.” Plaintiff’s temperature was 97; her heart rate was 100, and her blood pressure was 99/51 – “a significant drop” from the night before; her pain level was still 10 out of 10. Mr. Ursin, a physician assistant, saw plaintiff at about 4:30 p.m. Mr. Ursin noted plaintiff’s treatment from the night before and that plaintiff had an appointment with her doctor the next day. Plaintiff reported that she was still nauseated and vomiting and had vomited up her medication; she also felt dehydrated. Mr. Ursin noted plaintiff had body aches and chills.

Although it had been about an hour since plaintiff’s blood pressure had been checked, Mr. Ursin did not recheck it nor did he note any problems from her physical exam. Mr. Ursin ordered 500 cc of IV fluid, some morphine, Toradol for pain (although he did not chart the pain), an IV antibiotic, and Zofran. Dr. Milzman noted that 500 cc of fluid would not be enough to raise plaintiff’s blood pressure, giving plaintiff morphine could cause her blood pressure to drop, and Toradol could harm her kidneys; again, plaintiff’s creatinine levels from the night before indicated she may have kidney injury. Mr. Ursin also ordered labs. A little more than an hour later, plaintiff’s lab results came back showing her creatinine had gone up indicating “her kidney function is much worse [F]or the first time we have a blood count, and it’s low. . . . [A] low blood count goes along with being severely infected in some patients.”

1. The trial court allowed a defense motion to preclude “testimony from Ms. Ingram, the plaintiff in this case, about her recollection of presenting to the emergency department on the *morning* of February 24th[.]” (Emphasis added.) But despite this ruling, plaintiff was allowed to testify that she had come to the ER in the morning, but was told to return “home and give the medication time to work.” There was no medical record of the visit.

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About 6:00 p.m., a nurse went to check on plaintiff and could not get a blood pressure reading and could only feel a faint pulse; her blood pressure was 60 palpable, meaning she was in shock and did not have “enough blood pressure to adequately perfuse the body.” Mr. Ursin directed that the remainder of the 500 cc of fluid be administered, but he did not direct any other care or consult a physician. Defendant Robert C. Boleman was on duty at the time.

At 6:50 p.m., plaintiff’s blood pressure was even lower, 50/25. Mr. Ursin first consulted defendant Amy K. Ramsak, M.D. At about 7:56 p.m., defendant Boleman first saw plaintiff. Defendant Boleman ordered more antibiotics and started dopamine, a medication to help raise blood pressure. At this point, plaintiff started to receive critical care. Over the next hour, plaintiff received additional medication to raise her blood pressure, fluid, and antibiotics. At 9:01 p.m., defendant Ramsak who had previously provided other orders by phone, ordered a lactate level; the result was 5.6, which is “very high” and placed plaintiff at “50 percent, probably closer to 60 percent mortality at that time.” By 11:00 p.m., plaintiff was given a breathing tube and placed on a ventilator; hospital personnel continued to work on resuscitating plaintiff through that night and into the next morning. Plaintiff had progressed from shock to septic shock; Dr. Milzman described this progression:

[W]e have different criteria that we use for describing an infectious syndrome which takes into account any two of up to seventeen combinations of heart rate and temperature and white blood cell count and respiratory effort measurement. And so that’s called what we call SIRS or systemic inflammatory response syndrome, which is basically an infectious series of information that we use to identify people at big risk. So you can have an infection.

We talked about sepsis, when now the infection has created changes in the body’s response. So not just a sore throat, a strep throat, but a -- maybe high fever and high heart rate, that will get you sepsis. . . .

. . . .

. . . So if you want to think of it as a spectrum . . . there’s regular infection and then what we call SIRS, which is systemic inflammatory response syndrome. And then there’s sepsis, a source of infection plus these criteria. So that’s sepsis.

And then there’s severe sepsis which is you have the infection with all of these markers, plus the body is

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starting to fail. Either one or two organ systems start to fail. Like the kidneys start to fail. Like with Ms. Ingram, unfortunately. I told you her creatinine, which is a marker for kidney injury, is starting to go up. Later on she has trouble breathing, can't breathe on her own. They have to put a breathing tube in, put her on a ventilator which happens at 11:00 p.m. that night. So the body -- different organ systems in the body, the lungs, now are starting to fail.

. . . .

And you go from severe sepsis with a mortality rate of anywhere between 20 and 40, depending who you read, to septic shock, where now you have a mortality of 50 to 70 percent.

Dr. Milzman testified that Mr. Ursin did not provide adequate care because he did not make his supervising physician aware of plaintiff's 60 palp blood pressure when this was first discovered about 6:00 p.m., and he did not consult with the ICU and ask that plaintiff be admitted. Dr. Milzman also testified that defendants had missed the opportunities to intervene the night before or much earlier on 24 February after plaintiff returned to the ER. "[I]f you can intervene and prevent the patient from going into shock, you have a much better chance at survival."

C. Treatment at Mission Hospital

The next day, 25 February 2010, plaintiff was transferred to another hospital, Mission St. Joseph's Hospital in Asheville, because she needed "dialysis to get off the excess fluid."² Plaintiff was hospitalized for over a month. Upon discharge from Mission Hospital,

[i]t was noted in the records that a tampon was left in her at the time of catheterization and it was not immediately discovered. She had many diagnoses including severe systemic inflammatory response syndrome, suggestive of overwhelming sepsis. She had extensive finger and toe necrosis and skin sloughing with necrosis on both calves. Her fingers were eventually surgically removed and she is to have her toes removed in the near future. She was discharged from Mission Hospital on March 29, 2010.

Plaintiff had additional medical treatment after her discharge from the hospital and eventually lost all of her fingers and both legs below the knee.

2. Plaintiff did not bring any claims against Mission Hospital.

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II. Procedural Background

Plaintiff filed a complaint against defendants in May of 2011, alleging that each defendant was negligent in providing care and this resulted in her devastating injuries. Defendants all filed answers, denying the substantive allegations. Defendants also filed various motions, but for purposes of this appeal, we will not discuss them all. In March of 2013, defendant Pardee Hospital moved to dismiss “[p]laintiff’s complaint to the extent the complaint alleges or asserts that said Defendant is liable for the negligence of any health care provider except for Defendants Ryan Christopher Davis, M.D. and Robert C. Boleman, M.D., the health care providers that Plaintiff’s 9(j) expert identified as being negligent.” In October of 2014, the trial court allowed the motion and dismissed plaintiff’s claims against defendant Pardee Hospital “to the extent the Complaint asserts a claim for negligence based upon the theory that the nursing staff of Defendant County Hospital Corporation, Inc., d/b/a/ Margaret R. Pardee Memorial Hospital failed to comply with the applicable standard of care.”

The jury was impaneled on 29 January 2016, and the jury entered its verdict on 23 February 2016. The jury ultimately determined plaintiff had not been “injured by the negligence” of any defendant. In February of 2016, the trial court entered judgment determining plaintiff should “recover nothing” and her action was dismissed with prejudice. Plaintiff appeals both the October 2014 order and the February 2016 judgment.

III. Medical Malpractice Claims

In *Smith v. Whitmer*, this Court summarized the elements of a medical malpractice claim and how the plaintiff must prove those elements:

In a medical malpractice claim, a plaintiff must show (1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff. Section 90–21.12 of the North Carolina General Statutes prescribes the appropriate standard of care in a medical malpractice action:

In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is

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satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

Because questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, the plaintiff must establish the relevant standard of care through expert testimony. Further, the standard of care must be established by other practitioners in the particular field of practice of the defendant health care provider or by other expert witnesses equally familiar and competent to testify as to that limited field of practice.

Although it is not necessary for the witness testifying as to the standard of care to have actually practiced in the same community as the defendant, the witness must demonstrate that he is familiar with the standard of care in the community where the injury occurred, or the standard of care of similar communities. The same or similar community requirement was specifically adopted to avoid the imposition of a national or regional standard of care for health care providers.

159 N.C. App. 192, 195–96, 582 S.E.2d 669, 671–72 (2003) (citations and quotation marks omitted).

IV. Admission of Clinical Studies

Plaintiff first contends the trial court erred in allowing admission “into evidence, through defense questioning, of testimony by experts regarding three studies published four to five years after the events giving rise to plaintiff’s claims[.]” (Original in all caps.)³ Plaintiff contends the three studies “erroneously addressed the standard of care[.]” “the patients in the study were not comparable to plaintiff[.]” “the outcomes in the studies were irrelevant[.]” “the purpose of the studies was

3. Evidence about the three studies came before the jury through testimony, and thus plaintiff is not challenging the admission of the three studies themselves but rather the testimony regarding them. But the trial court considered the three studies themselves for purposes of ruling on plaintiff’s evidentiary objections, so we will consider this issue based upon the same information.

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irrelevant[.]” and “the probative value of the testimony was substantially outweighed by its prejudicial effect[.]” (Original in all caps.)

A. Preservation of Objection

[1] Defendants contend plaintiff failed to preserve her objection to the admission of evidence regarding the three studies – ProCESS,⁴ ProMISE,⁵ and ARISE⁶ (collectively “three studies”) – and has waived review on appeal because plaintiff also presented evidence related to the three studies on direct examination in questioning her own expert witness. Defendants agree they first mentioned and introduced evidence regarding the studies and also that plaintiff made a continuing objection which the trial court allowed. But defendants argue that despite the valid continuing objection, plaintiff later waived that objection when her counsel asked questions regarding the studies on direct examination. According to defendants’ argument, plaintiff could not ask questions on direct examination regarding the three studies without waiving her objection.

Although defendants’ argument focuses on a few lines of the transcript, we have reviewed all of the relevant testimony and full context of plaintiff’s questioning regarding the three studies. Once the trial court had allowed the evidence regarding the three studies over plaintiff’s objection, she was not required to avoid mention of the studies but was permitted to attempt to limit or avoid any prejudice from the evidence without losing the benefit of the continuing objection:

The well established rule that when incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost, but, as stated by *Brogden, J.*, in *Shelton v. Southern R. Co.*, 193

4. The ProCESS Investigators, A Randomized Trial of Protocol-Based Care for Early Septic Shock, *The New England Journal of Medicine* 370:18, p. 1683, May 1, 2014 (“ProCESS”).

5. Paul R. Mouncey, M.Sc., Tiffany M. Osborn, M.D., G. Sarah Power, M.Sc., David A. Harrison, Ph.D., M. Zia Sadique, Ph.D., Richard D. Grieve, Ph.D., Rahi Jahan, B.A., Sheila E. Harvey, Ph.D., Derek Bell, M.D., Julian F. Bion, M.D., Timothy J. Coats, M.D., Mervyn Singer, M.D., J. Duncan Young, D.M., and Kathryn M. Rowan, Ph.D. for the ProMISE Trial Investigators, Trial of Early, Goal-Directed Resuscitation for Septic Shock, *The New England Journal of Medicine*, March 17, 2015 (“ProMISE”).

6. The ARISE Investigators and the ANZICS Clinical Trials Group, Goal-Directed Resuscitation for Patients with Early Septic Shock, *The New England Journal of Medicine*, October 9, 2014 (“ARISE”).

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N.C. 670, 139 S.E. 232, 235: The rule does not mean that the adverse party may not, on cross-examination, explain the evidence or destroy its probative value, *or even contradict it with other evidence upon peril of losing the benefit of his exception.*

State v. Godwin, 224 N.C. 846, 847–48, 32 S.E.2d 609, 610 (1945) (emphasis added) (quotation marks omitted).

Plaintiff’s questioning regarding the three studies pointed out their limitations and differences and were intended to demonstrate her contention that they were not relevant to her case. Since the trial court allowed the evidence over her objection, plaintiff could attempt to “contradict” the studies with her witnesses’ testimonies. *See id.* Because plaintiff properly preserved her continuing objection, her later questioning on direct examination of her witnesses regarding the three studies did not waive her objection.

B. EGDT and the Three Studies

During the trial, several medical studies were discussed. Plaintiff contended that she should have received early goal-directed treatment (“EGDT”) and defendants countered with other studies. The EGDT protocol was described in an article published in 2001 in which Dr. Emanuel Rivers was the principal investigator (“Rivers study”).⁷ Dr. Rivers compared the outcomes in two groups of patients presenting with sepsis; this trial was done at a single hospital and enrolled 263 patients.⁸ Rivers study at 1368. The control group was the “standard-therapy group” which was “treated at the clinicians’ discretion according to a protocol for hemodynamic support . . . with critical-care consultation, and were admitted for inpatient care as soon as possible.” *Id.* at 1370 (footnote omitted). The other group received the EGDT protocol. *See id.*

One of plaintiff’s expert witnesses,⁹ Dr. Daniel Snider, explained EGDT and the results of the Rivers study in his testimony. All of the

7. Emanuel Rivers, M.D., M.P.H., Bryant Nguyen, M.D., Suzanne Havstad, M.A., Julie Ressler, B.S., Alexandria Muzzin, B.S., Bernhard Knoblich, M.D., Edward Peterson, Ph.D., and Michael Tomlanovich, M.D. for the Early Goal-Directed Therapy Collaborative Group, Early Goal-Directed Therapy in the Treatment of Severe Sepsis and Septic Shock, *The New England Journal of Medicine*, 345:19, p. 1368, November 8, 2001 (“Rivers study”).

8. “Twenty-seven patients did not complete the initial six-hour study period (14 assigned to the standard therapy and 13 assigned to early goal-directed therapy)[.]” Rivers study at 1371.

9. The trial court allowed Dr. Snider “to testify as an expert in these fields” and seemed to be referring to the fields of internal medicine and emergency medicine. But

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patients presented with sepsis, and one group received the EGDT protocol – “from the beginning, starts IV fluid, starts antibiotics, aggressive IV fluids” – and the other group received the “standard therapy” at that time. Dr. Snider testified that Dr. Rivers

found that the patients that he had enrolled in his protocol which I called Early – he identified them as soon as he saw SIRS, which is basically vital signs and a white blood cell count if he needs it – Goal-Directed – he had these goals, he wanted to get fluids in the patient as fast as he could. That was a goal. He wanted to maintain a blood pressure with pressors, dopamine or Levophed which is a brand name for norepinephrine which is a precursor to adrenaline. Probably more than you need know. Goal-Directed, by trying to achieve these goals, good blood pressure, good fluid resuscitation, antibiotics, those are all worthy goals in a septic patient – Therapy. So that’s EGDT that we’ve been hearing over and over.

What did he find in the treatment of the early goal-directed therapy? He found that in six hours they had a lower heart rate, they had a higher blood pressure. That’s significant. Blood pressure is where it’s at. You want that blood pressure high. Because a low blood pressure, shock in the worst case, means you are not getting oxygen to the tissue, the tissue is dying, your lactate acid is going up, your kidneys are failing, your brain is starting to shut down, you’re becoming lethargic or worse, comatose, your breathing is not functioning, you have to go on a ventilator. All bad things. But he found that the blood pressure was coming up at six hours in the treatment group that got the goal-directed therapy, early goal-directed therapy.

So what else did he find? Well, ultimately following these patients out further he found that 46 percent survived from septic shock versus 30 percent in the treatment arm that did not get early goal-directed therapy. 46 percent versus 30. That’s for every seven patients that would have died, one of those patients actually survived,

the trial court went on to state, “[h]owever, in regard to the standard of care, I will not allow him to testify to the standard of care in regard to the emergency room physicians or emergency department physicians, except to the extent that they had some duty to report to someone else when certain symptoms or certain things were observed in regard to the plaintiff.” Plaintiff contests this determination by the trial court, and we address that issue in a later section.

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they got to go home and with be their family. So it was a big deal saving one life that you would have lost out of every seven.

So what happened next? Well, this was published in the *New England Journal of Medicine*. It's pretty prestigious, no matter what you've heard. I've certainly never been published in the New England Journal, and I would love to be. It's – the world took notice. Okay? In 2004 an international committee made up of doctors from all over the world, Germany, Latin America, Japan, United States of course, of all kinds of doctors, critical care doctors, emergency medicine doctors, surgeons, infectious disease doctors, all of these committees and doctors and countries got together and they came up with guidelines, much of what was based on Dr. Rivers' studies, *Guidelines For the Treatment of Sepsis*. And it was published in, I'm sure – I'm quite confident, more than one journal because it was just so far-reaching.

And those guidelines recommended certain things. They recommended rapid fluids. They recommended antibiotics. They recommended all of this within six hours. They even recommended things that – that Dr. Rivers had found would be helpful but have since found to be maybe not as helpful as he thought. But they recommended that in 2004. And by 2010 those were still the guidelines internationally.

The Rivers study noted that its “primary efficacy end point” was “[i]n-hospital mortality[,]” and secondary end points were “resuscitation end points, organ-dysfunction scores, coagulation-related variables, administered treatments, and the consumption of health care resources.” *Id.* at 1370. The Rivers study concluded that EGDT

provided at the earliest stages of severe sepsis and septic shock, though accounting for only a brief period in comparison with the overall hospital stay, has significant short-term and long-term benefits. These benefits arise from the early identification of patients at high risk for cardiovascular collapse and from early therapeutic intervention to restore a balance between oxygen delivery and oxygen demand.

Id. at 1376.

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Defendants' witnesses presented evidence regarding the three studies, which plaintiff contends are not relevant. All three studies compared the EGDT protocol to other standard treatment; all note some controversy regarding the efficacy of the EGDT protocol. As described by the ProCESS study, the Rivers study was "[i]n a single-center study published more than a decade ago" which involved "patients presenting to the emergency department with severe sepsis and septic shock" which found that

mortality was markedly lower among those who were treated according to a 6-hour protocol of early goal-directed therapy (EGDT), in which intravenous fluids, vasopressors, inotropes, and blood transfusions were adjusted to reach central hemodynamic targets, than among those receiving usual care. We conducted a trial to determine whether these findings were generalizable and whether all aspects of the protocol were necessary.

ProCESS at 1683.

The ProCESS study was done from 2008 to 2013 in 31 United States emergency departments with 1,341 patients enrolled. *See id.* at 1683, 1686. ProCESS considered differences in 90 day mortality, 1-year mortality, and "the need for organ support." *Id.* at 1683, 1685. The ProCESS study ultimately concluded that "protocol-based resuscitation of patients in whom septic shock was diagnosed in the emergency department did not improve outcomes." *Id.* at 1683.

The ProMISE trial was conducted in 56 hospitals in England from 2011 to 2014, with 1,260 patients enrolled. ProMISE at 1, 3. ProMISE concludes that "[i]n patients with septic shock who were identified early and received intravenous antibiotics and adequate fluid resuscitation, hemodynamic management according to a strict EGDT protocol did not lead to an improvement in outcome." *Id.* at 1.

The ARISE study tested "the hypothesis that EGDT, as compared with usual care, would decrease 90-day all-cause mortality among patients presenting to the emergency department with early septic shock in diverse health care settings." ARISE at 2. The ARISE trial was conducted from 2008 until 2014 at 51 hospitals in several countries, most in Australia or New Zealand, with 1,600 patients enrolled. *See id.* at 1-2. The ARISE study noted,

EGDT was subsequently incorporated into the 6-hour resuscitation bundle of the Surviving Sepsis Campaign

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guidelines, and a number of nonrandomized studies showed a survival benefit with bundle-based care that included EGDT. Despite such successes, considerable controversy has surrounded the role of EGDT in the treatment of patients with severe sepsis. Concerns have included the potential risks associated with individual elements of the protocol, uncertainty about the external validity of the original trial, and the infrastructure and resource requirements for implementing EGDT.

Id. at 2 (footnotes omitted). ARISE concluded that “the results of our trial show that EGDT, as compared with usual resuscitation practice, did not decrease mortality among patients presenting to the emergency department with early septic shock.” *Id.* at 10.

As noted in the summary of plaintiff’s care, her evidence showed first that her diagnosis of sepsis was delayed, and second, she did not receive EGDT. Generally, plaintiff’s evidence showed that her condition was not correctly diagnosed on 23 February, her diagnosis was delayed on 24 February, and her initial treatment on both days she came to the hospital was much less aggressive than treatment by EGDT. Plaintiff contended to the jury that if she had been promptly diagnosed with sepsis and received EGDT, her outcome would have been improved and she would not have suffered serious and permanent injuries, including amputations.

C. Relevance of Studies and Prejudicial Effect

[2] Plaintiff argues that the three studies are not relevant for several reasons. Plaintiff contends that the three studies “erroneously addressed the standard of care” and considered “mortality, not morbidity.” Plaintiff also argues that the purposes and outcomes of the three studies were not relevant because the study patients were not similar to or in the same circumstances as plaintiff. Plaintiff’s fifth argument is that even if the studies are relevant “the probative value of the testimony was substantially outweighed by its prejudicial effect[.]”

[Under Rule 401 e]vidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. . . . Although the trial court’s rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better

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situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403.

Dunn v. Custer, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citations and quotation marks omitted).

1. Timing of the Three Studies

The primary basis for plaintiff's objection, as noted in her motion in limine and during argument of the motions, was her contention the three studies are not relevant to the issues in dispute because they were published in 2014 and 2015 and could not have been a consideration in determining the standard of care for treatment of sepsis in 2010. In other words, plaintiff contends the three studies are not relevant to the issues in dispute because they were published *after* her hospitalization:

These studies that they are talking about came up in 2014, four years after Ms. Ingram had lost her fingers and her legs and her feet. And what they are trying to do – we have a motion to prevent them from bringing this study in, because it doesn't inform anything about what happened to Ms. Ingram in 2010. And essentially what they are trying [to] do is to change in 2014 the standard of care in 2010. That's what these studies are about.¹⁰

In this part of plaintiff's argument on why evidence regarding the three studies should not have been admitted plaintiff also contends

[t]o the extent that the studies addressed the standard of care, either directly or indirectly, they were grossly misleading to the jury in that they suggested that the standard of care at the time the studies were published was the same as the standard of care in 2010 when Ms. Ingram was injured. . . . [T]he studies purport to address the issue of causation, by implication the studies address the standard of care by concluding that Early Goal Directed Therapy (EGDT), an element of the standard of care according to

10. In addition, plaintiff contended that even if they were relevant to some extent, they were unfairly prejudicial due to the risk of misleading or confusing the jury as to the standard of care in 2010; we will address this contention below in this opinion.

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Plaintiff's experts, would have been of no benefit to . . . [plaintiff]. . . . In short, Defendants were saying by these studies that the standard of care didn't matter because Ms. Ingram would have had the same outcome if the standard of care had been followed.

Plaintiff is correct: "Defendants *were* saying by these studies that the standard of care didn't matter because Ms. Ingram would have had the same outcome if the standard of care had been followed." (Emphasis added). In other words, the three studies are relevant to show lack of causation no matter the timing, because they tend to show that the results from EGDT and "standard treatment" are about the same. *See generally* ProCESS, PROMISE, ARISE. The three studies have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Dunn*, 162 N.C. App. at 266, 591 S.E.2d at 17. This argument is overruled.

2. Mortality versus Morbidity

Plaintiff next contends that the three studies were irrelevant because they were comparing "mortality, not morbidity." This assertion is simply not borne out by the three studies. Plaintiff argues "the studies shed no light on what likely would have happened to her if she had been diagnosed earlier and treated accordingly." Plaintiff's own expert testified that the three studies did not find any difference in mortality or *morbidity* between EGDT as compared to "another protocol[.]" Even though the primary focus of the studies may have been on mortality, all of the studies address both mortality and morbidity to some extent, as a consideration of morbidity is only even possible if patients survive and thus necessitates some consideration of mortality. This argument is overruled.

3. Comparability of Patients in Studies

Plaintiff next argues "[t]he outcomes of the patients in the three studies offered by Defendants have no application to . . . [plaintiff] because the patients included in the studies were not comparable to" her. Plaintiff points out that

[t]he health status of the patients varied from patient to patient and included a variety of patients, some of whom were older than Ms. Ingram, more advanced in sepsis than Ms. Ingram, younger than Ms. Ingram, and sicker than Ms. Ingram. There were no patients referenced in the studies

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who had come to the hospital under circumstances like Ms. Ingram[.]

It is probably true that no patient in any of the studies was exactly like plaintiff, but no two patients in any studies are exactly alike. According to plaintiff, the lack of almost identical patients would make all medical studies of no use in determining how to best treat other patients. Plaintiff's contentions regarding the characteristics of the patients enrolled in each study do not change the relevance of the three studies but go only to the weight and credibility of the evidence. Every patient in each study was unique but the physicians conducting the studies determined that the patients met the enrollment criteria of the particular study. Naturally, there were differences in the design, endpoints, methodology, and enrollment criteria for each study. The expert witnesses addressed these details on both direct examination and cross examination. This argument is without merit.

4. Prejudicial Effect

Last, plaintiff argues that even if the three studies had some relevance, the trial court should have excluded them under Rule 403 because they are misleading and unfairly prejudicial to plaintiff. Under Rule 403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2015).

In general, the exclusion of evidence under the Rule 403 balancing test is within the sound discretion of the trial court. Abuse of discretion occurs where the court's ruling is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision.

State v. Syriani, 333 N.C. 350, 379, 428 S.E.2d 118, 133 (1993) (citations omitted).

Plaintiff argues the three studies were "dangerously misleading" because they have the "initial appearance of . . . addressing septic shock, which . . . [plaintiff] ultimately developed." Again, plaintiff's argument of unfair prejudice is premised upon the fact that the patients in the three studies were not "comparable to" plaintiff:

There is nothing in the studies to suggest that any of the patients were Ms. Ingram's age, had a similar or comparable medical history, were otherwise healthy upon their

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presentation to the hospital or were turned away from the hospital at the earliest stages of sepsis and returned to the hospital on two additional occasions before any therapy was started.

Plaintiff's focus on the characteristics and circumstances of each patient in a medical trial is misguided. Again, by plaintiff's standard, there would be no medical study possible which could be admissible in a medical malpractice case; even the Rivers study cannot meet this standard. Some studies may have patients who more closely resemble plaintiff or some may have more differences, but the expert medical testimony is necessary to evaluate the strengths and weaknesses of each study and determine which studies are most applicable for a particular situation. The evidence here shows that the primary goal of each of the three studies was to determine the efficacy of the protocol for EGDT – the very protocol plaintiff advocated as the standard of care for her treatment – the three studies were relevant for this purpose, and again, plaintiff's arguments go to the weight and credibility of the three studies, not unfair prejudice. The trial court did not abuse its discretion in ruling that the probative value of the three studies was not “outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]” N.C. Gen. Stat. § 8C-1, Rule 403.

In addition, based upon plaintiff's objection to use of the three studies to establish a standard of care, the trial court gave a limiting instruction as to the three studies: “Any medical literature published after February 23rd, 2010, cannot be considered for the purpose of establishing standard of care in this case. However, it may be used for other purposes in this case.” Plaintiff argues this limiting instruction was not sufficient, since “advising the jury not to consider the studies on the issue of the standard of care, it is unrealistic to assume that jurors, in a complex case as this one was, would be able to appropriately apply the limitation.” But we do not assume the jury failed to follow the instructions, despite the complexity of the case: “A jury is presumed to follow the court's instructions, and we must therefore presume that the jury based its verdict on these instructions.” *Ridley v. Wendel*, __ N.C. App. __, __, 795 S.E.2d 807, 813–14 (2016) (citation, quotation marks, and brackets omitted). This is argument is overruled.

V. Preclusion of Dr. Snider's Testimony Regarding Standard of Care

[3] Plaintiff next contends that

the trial court erred in precluding plaintiff's expert, Dr. Daniel Snider, from testifying regarding the applicable

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standard of care for defendant emergency room physicians and physician assistant when plaintiff's expert was engaged in a similar practice which included patients with the same illnesses as plaintiff and the same treatment modalities and procedures as those applied to plaintiff and which gave rise to plaintiff's injuries.

We review the trial court's ruling excluding Dr. Snider's testimony as to standard of care for abuse of discretion:

Rule 702 of the North Carolina Rules of Evidence governs the admissibility of expert testimony. It states:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

Our courts construe this Rule to admit expert testimony when it will assist the factfinder in drawing certain inferences from facts, and the expert is better qualified than the factfinder to draw such inferences. A trial court is afforded wide latitude in applying Rule 702 and will be reversed only for an abuse of discretion.

In re Hayden, 96 N.C. App. 77, 82, 384 S.E.2d 558, 561 (1989) (citations, quotation marks, ellipses, and brackets omitted).

We have reviewed the testimony at trial at length. Even if the trial court erred by precluding a portion of Dr. Snider's expert testimony, plaintiff cannot demonstrate prejudice since ultimately Dr. Snider testified regarding his opinion of how plaintiff should have been tested when she arrived at the emergency department and of the diagnosis suggested by her symptoms:

Q. Dr. Snider, given the presentation, including the complaints and findings of Ms. Ingram's condition on the night of February 23rd *when she was at the emergency department* at Pardee, what were those signs, symptoms indicative of in your opinion?

MR. CURRIDEN: Objection, Your Honor.

THE COURT: Overruled.

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A. *In my opinion I think she was presenting with early sepsis. And the only tests that we don't have to back that up is a complete blood count, a very simple test. A test that I want to know the results of when I see somebody with abdominal cramps, vomiting, generalized pain 10 of 10, shortness of breath, body aches. I mean, that's – that's a constitutional whole body response, not something localized like a urinary tract infection, a simple urinary tract infection.*

The only way – well, let me rephrase that. One of the easiest ways to determine if this is much more serious than what we see on the record here is to get a CBC, a blood count. I would imagine everybody on the jury has had a blood count at some point in their life.

MR. CURRIDEN: Objection. Motion to strike, Your Honor.

THE COURT: Overruled. The motion is denied.

A. It provides basic information including a white blood cell count, which I mentioned is the body's way of fighting off infection. When you have infection, especially an infection that goes systemic, your white blood cell count would absolutely be expected to go up.

Q. Now – I'm sorry, go ahead. Finish your answer then I have another question for you.

A. We don't have a white count, a simple test. In my opinion if we had had a white count that night, it would have demonstrated findings very suggestive or conclusive for sepsis much like the white count the following day did. And that would have cleared the air very quickly.

This was not a simple UTI, and she needed to be admitted for IV antibiotics, IV fluids. If this had been done, I have to say in my opinion it would have overwhelmingly changed the outcome here. Way more than likely than not, to use a legal term, Ms. Ingram would not have lost her fingers, not have lost her toes. I doubt much of what took place the following day would have ever happened if she had been admitted that night, received IV antibiotics and more aggressive IV fluid resuscitation. That was a crucial point in this whole course of

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events for Tokisha Ingram. Not getting a CBC that night changed the course of history for her.

(Emphasis added.) Plaintiff cannot demonstrate that excluding testimony by Dr. Snider regarding the standard of care as to diagnosis of sepsis caused her any prejudice, considering the evidence permitted by the trial court. Furthermore, plaintiff's other expert witnesses also testified regarding the standard of care. This argument is overruled.

VI. Rule 9(j) Dismissal of Nursing Care Claim

[4] Plaintiff's complaint alleged negligence by hospital nursing staff for failing "to correctly triage" plaintiff and failing "to recognize the severity of . . . [plaintiff's] condition." The complaint also alleged that "[t]he medical care in this case has been reviewed by persons who are reasonably expected to qualify as expert witnesses under Rule 702 of the Rules of Evidence and who are willing to testify that the defendants' care did not comply with applicable standards of care." In Rule 9(j) discovery responses, plaintiff identified Dr. Sixsmith as her "reviewing expert[.]" although the response did not specifically identify nursing care.

In March of 2014, defendant Pardee Hospital moved to dismiss plaintiff's claim regarding nursing care because plaintiff's expert witness on this issue, Dr. Diane Sixsmith, testified in her deposition she did not believe that the nursing care fell below the applicable standard of care. The trial court entered an order on 10 October 2014 dismissing plaintiff's claims against defendant Pardee Hospital "to the extent the Complaint asserts a claim for negligence based upon the theory that the nursing staff of Defendant County Hospital Corporation, Inc., d/b/a/ Margaret R. Pardee Memorial Hospital failed to comply with the applicable standard of care."

Plaintiff contends that the trial court erred by

dismissing under Rule 9(j) the plaintiff's claim of negligence against the Hospital involving nursing care when a qualified expert reviewed the medical care pursuant to Rule 9(j) and concluded that the hospital care fell below the standard, but did not specify the particular ways in which the care fell below the standard.

(Original in all caps.)

North Carolina General Statute § 1A-1, Rule 9(j) provides in relevant part:

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Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

- (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C. Gen. Stat. §1A-1, Rule 9(j) (2015).

Compliance with Rule 9(j) is a question of law, which we review *de novo*:

A plaintiff's compliance with Rule 9(j) requirements clearly presents a question of law to be decided by a court, not a jury. Because it is a question of law, this Court reviews a complaint's compliance with Rule 9(j) *de novo*. When ruling on a motion to dismiss pursuant to Rule 9(j), a court must consider the facts relevant to Rule 9(j) and apply the law to them. A complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the certification is not supported by the facts, at least to the extent that the exercise of reasonable diligence would have led the party to the understanding that its expectation was unreasonable. When a trial court determines a Rule 9(j) certification is not supported by the facts, the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination.

Estate of Wooden v. Hillcrest Convalescent Ctr., 222 N.C. App. 396, 403, 731 S.E.2d 500, 506 (2012) (citations, quotation marks, and brackets omitted).

The trial court's October 2014 order includes detailed findings of fact regarding plaintiff's negligence claims arising from nursing care, plaintiff's responses to discovery on this issue, and Dr. Sixsmith's

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deposition testimony; plaintiff's brief challenges none of these findings of fact as unsupported by competent evidence, so they are binding upon this Court. *See In re C.B.*, ___ N.C. App. ___, ___, 783 S.E.2d 206, 208 (2016) ("Unchallenged findings are binding on appeal.")

Plaintiff argues her complaint complied with Rule 9(j) because

[t]here is no question in this case that the Complaint specifically asserts that the medical care at issue in this case was reviewed by a person who was reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who was willing to testify that the medical care did not comply with the applicable standard of care.

Plaintiff contends that she reasonably expected Dr. Sixsmith, her identified expert, to testify regarding nursing care. The trial court's findings of fact quoted Dr. Sixsmith's deposition where she stated that she had not believed nor would she testify that the nursing care provided by defendant Pardee Hospital fell below the standard of care. "[I]t is also now well established that even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate." *Ford v. McCain*, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 (2008).

Plaintiff further contends that even if Dr. Sixsmith was unwilling to testify

Dr. David Milzman, Dr. Daniel Abbott and Dr. Daniel Snider were all willing to testify at trial that the nursing care fell below standard. Their willingness to testify was brought to the attention of the trial court before the trial court dismissed the action against Defendant Pardee as to nursing care. The particulars of the criticisms held by each of these witnesses, all of whom testified at trial, were contained in their respective depositions.

But plaintiff failed to identify Dr. Milzman, Dr. Abbott, and Dr. Snider as experts who would offer opinions regarding nursing care in response to discovery. In addition, plaintiff has failed to direct us to any place in the 678 page record, five depositions, or 2,930 pages of trial transcript where we might find verification of plaintiff's assertion that other experts were identified regarding nursing care before the trial court's May 2014 hearing on this issue to testify regarding nursing care; plaintiff's argument section on this issue contains no specific reference to the evidence

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before us. Therefore, the trial court's unchallenged findings of fact support its conclusion of law that plaintiff's "claim for negligence based upon the theory that the nursing staff of" defendant Pardee Hospital did not comply with Rule 9(j) and should therefore be dismissed. This argument is overruled.

VII. Exclusion of Evidence of Morning Visit to the Hospital

[5] Last, plaintiff argues that the trial court erred in allowing defendant's motion in limine and thus "limiting and excluding testimony from plaintiff and plaintiff's witnesses regarding plaintiff's visit to defendant Pardee Hospital on the morning of 24 February 2010." (Original in all caps.)

We review a trial court's rulings on motions *in limine* and on the admission of evidence for an abuse of discretion. This Court will find an abuse of discretion only where a trial court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

State v. Hernandez, 184 N.C. App. 344, 348, 646 S.E.2d 579, 582 (2007) (citations and quotation marks omitted).

Defendant Pardee Hospital filed a motion in limine seeking to prevent plaintiff from testifying about a visit to the hospital on the morning of 24 February 2010. According to the defendant's argument on the motion in limine¹¹, plaintiff testified in her deposition she returned to the hospital on the morning of 24 February 2010:

Ms. Ingram recalled in her deposition, and there's no allegation about this in the complaint either, but during her deposition she said, "Well, I do remember coming to the hospital on the morning of the 24th." Her recollection or best timeframe was about 10:00 o'clock or 10:30 the morning of the 24th. And that she was basically taken back to a treatment room and then told – she overheard someone say on the other side of the curtain or wall, quote, "she is just a popper."¹² And then someone, a nurse, who she describes as a nurse, came back into the room and told her "you just need to go home and give the medicine time

11. Plaintiff did not include her deposition in our record, so we will quote defendants' counsel's argument on this issue.

12. According to plaintiff's brief, she understood the term "popper" "to mean that she was a pill popper and was seeking medication and treatment."

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to work.” There’s no medical records, there’s no other evidence of any visit on the morning of the 24th.

Defendant then argued:

Ms. Ingram’s testimony is that she interacted with the nursing staff. And as we have established in the first motion in limine, which is that the Hospital nursing staff as a theory of liability cannot exist in light of the Court’s order from October 2014 dismissing the complaint, and as plaintiff’s counsel has already indicated the only issue they intend to submit to the jury as to the Hospital’s liability is the issue of apparent agency for Boleman, Davis, Dr. Ramsak, and perhaps Ursin, understanding we left that issue open. This testimony about a visit on the morning the 24th has no relevance to any claim in the case and, therefore, should be excluded.

The trial court allowed the motion in limine, with a qualification that it may reconsider depending upon the evidence presented during the trial:

Well, I’m going to allow that motion. But if you believe the door was opened by that argument she wasn’t as – the evidence might tend to show she wasn’t as sick as she claimed or something similar, then I will reconsider that then. And I think I would probably allow that. Although, most likely not the comment that was overheard about being a popper.

At trial, plaintiff testified about her return to the hospital on the morning of 24 February 2010:

A. On the sheet it said that, at the bottom of the sheet, I remember it said something about if you had these symptoms to come back. And then I was feeling really bad, so I went back that morning to the hospital.

Q. Okay. Did you get any treatment when you got back?

A. No, sir.

MR. JACKSON: Objection.

THE COURT: Overruled.

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Q. What -- what happened when you went back? When I say what happened, did you stay at the hospital, did you get treatment or what? Tell us about that.

A. When I went back to the hospital and I had conversation with, I assume, the receptionist, and what I remember is someone, I don't remember who it was, telling me that I needed to give the medication time to work.

MR. JACKSON: Objection.

MR. CURRIDEN: We object.

THE COURT: Overruled.

Q. I'm sorry. There were some interruptions there. Could you repeat that? Somebody said what?

A. That I needed to give the medication time -- that I needed to go back home and give the medication time to work.

MR. JACKSON: Objection.

THE COURT: Mr. Ferguson, I want to say something to the jury.

MR. FERGUSON: Yes, sir.

The trial court then gave a limiting instruction to the jury, in accord with its ruling on defendants' motion in limine:

THE COURT: Members of the jury, as I said yesterday, there's no claim or allegation that anyone at the Hospital did anything wrong or negligent regarding this morning visit. Nobody, no nurse, no doctor or physician assistant. So when you get to the point of deciding whether negligence was committed, this has nothing to do with it. Please go ahead, Mr. Ferguson.

Plaintiff then resumed her testimony:

Q. So what did you do after this person told you to go back home and give the medication time to work?

A. I went back home and laid down.

Q. How did you feel when you got back home?

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A. I laid there for a little while, and I may have made some phone calls or something. I don't quite remember. But after awhile I went back to the hospital. My auntie told me that I needed to go back.

Plaintiff argues that her

testimony of the details of this visit would have shed light on how sick the Plaintiff was and her efforts to get help as soon as possible. The evidence would have further shown that at the time the Hospital did not take her complaints seriously and demonstrated a reluctance to provide help.

But the testimony plaintiff actually gave showed exactly this – “how sick” she was, “her efforts to get help as soon as possible[,]” and “the Hospital did not take her complaints seriously and demonstrated a reluctance to provide help.”

Furthermore, plaintiff made no proffer of additional evidence she contends the trial court should have allowed her to present, so she has not preserved this argument for appellate review. *See generally State v. Reaves*, 196 N.C. App. 683, 687, 676 S.E.2d 74, 77 (2009) (“Likewise, a party objecting to the grant of a motion in limine must attempt to offer the evidence at trial to properly preserve the objection for appellate review.”) The only “limitation” or “exclusion” the trial court applied to plaintiff’s testimony about her return visit to the hospital on the morning of 24 February 2010 was to instruct the jury that plaintiff had no claim for medical negligence arising from the alleged conduct of hospital staff from that morning, and, as discussed above, the trial court properly dismissed that claim. The trial court did not abuse its discretion by instructing the jury as to the limitation on the purpose of plaintiff’s testimony. This argument is overruled.

VIII. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Chief Judge McGEE and Judge MURPHY concur.

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[259 N.C. App. 294 (2018)]

CURTIS LAMBERT, PLAINTIFF

v.

TOWN OF SYLVA, DEFENDANT

No. COA17-84

Filed 1 May 2018

1. Immunity—governmental—defense not raised by defendant—raised ex mero motu by trial court

The trial court erred by dismissing plaintiff's state law claim for wrongful discharge based on governmental immunity where the trial court raised it ex mero motu. Governmental immunity is an affirmative defense that must be pled by the defendant.

2. Civil Rights—42 U.S.C. § 1983—firing for political activity—directed verdict

The trial court erred by granting a directed verdict for defendant on a 42 U.S.C. § 1983 claim at the close of plaintiff's evidence where plaintiff was a police officer who alleged that he was fired for running for sheriff. Taking plaintiff's evidence as true and drawing every reasonable inference therefrom, plaintiff presented sufficient evidence to survive the motion for directed verdict; although defendant contended that it could insulate itself from responsibility by leaving the final decisions to the police chief and town manager, such is not the law.

3. Parties—necessary—failure to join

The trial court erred by dismissing plaintiff's claims arising from his termination as a law enforcement officer (after he ran for sheriff) for failure to join a necessary party where defendant never requested joinder of any other parties and the Court of Appeals could not determine from the transcript, record, or order whom the trial court believed to be a necessary party or why they would be necessary even if they were proper.

Appeal by plaintiff from order entered 13 June 2016 by Judge Mark E. Powell in Superior Court, Jackson County. Heard in the Court of Appeals 23 August 2017.

David A. Sawyer for plaintiff-appellant.

Ridenour & Goss, P.A., by Eric Ridenour and Jeffrey Goss, for defendant-appellee.

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STROUD, Judge.

Plaintiff Curtis Lambert (“plaintiff”) appeals from the trial court’s order of dismissal in favor of defendant Town of Sylva (“defendant”). At the close of plaintiff’s evidence in a jury trial of the three claims in the complaint, the trial court granted a directed verdict for defendant on all claims. Plaintiff appealed, and for the reasons that follow, we reverse and remand for a new trial.

I. Facts

Because this case turns on legal issues, we will present only a brief summary of the facts based upon plaintiff’s evidence. Plaintiff was employed by defendant as a police officer for the Town of Sylva. He was supervised by the Chief of Police Davis Woodard; Chief Woodard was under the supervision of the Town Manager, Paige Roberson Dowling. On 17 February 2014, plaintiff filed to run for Jackson County Sheriff, as a Republican. Plaintiff claims that Chief Woodard ridiculed him for running for sheriff and took other adverse actions against him for this reason. On 3 March 2014, Chief Woodard called plaintiff in to meet with him, the Town Manager, and an assistant chief and then demanded that plaintiff resign his position as a police officer. He refused, so Chief Woodard fired him. When he asked why, Chief Woodard and the Town Manager claimed to have received complaints about him, although plaintiff had never been informed of any complaints. Plaintiff then inquired about his personnel file and found it contained no complaints, reprimands, or counseling notifications, other than one undated and unsigned memo purportedly from a detective regarding a traffic checkpoint conducted in November 2013. Plaintiff sought to appeal his termination with the Town of Sylva, but the Town Manager affirmed the termination and told him that the decision was final.

Despite the absence of any complaints or disciplinary action in his personnel file, after plaintiff applied to receive unemployment benefits, defendant provided information to the North Carolina Employment Security Commission stating that plaintiff was terminated for excessive absenteeism and claimed that he had been warned about this, although his personnel file included no such warnings and showed that plaintiff’s only absences had been for illness and the birth of his child – all approved by defendant under the Town’s usual policies for sick leave.

Plaintiff filed a complaint against defendant on 2 March 2015, alleging claims under 42 U.S.C. § 1983 based upon defendant’s violations of his state and federal constitutional rights to free speech and association

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and for his wrongful termination in violation of North Carolina public policy as expressed in N.C. Gen. Stat. § 160A-169, since he was fired based upon his political activity or beliefs. Plaintiff also alleged that defendant had purchased liability insurance coverage for employment cases and had waived any defense of “sovereign immunity to the extent of coverage under the policy.”

On 7 April 2015, defendant filed its answer, which admitted a few allegations of the complaint and denied the others. The answer alleged that plaintiff’s employment was at will and could be terminated at the will of the defendant, without regard to his performance. But the answer is most notable here for the total absence of any affirmative defenses, particularly any claim of any sort of governmental immunity. According to the record before this Court, defendant filed no motion to dismiss and never moved for summary judgment. The complaint, defendant’s acceptance of service, and answer were the only documents filed in the case until the jury trial started.

Plaintiff’s claims came on for a jury trial on 23 May 2016, with the jury impaneled on 24 May 2016. On 25 May 2016, at the close of plaintiff’s evidence, defendant filed a written motion for directed verdict “pursuant to Rule 50, Rule 12(b)(6) and Rule 12(b)(7) of the North Carolina Rules of Civil Procedure.” Defendant made four arguments for directed verdict, which we will summarize briefly:

(1) The doctrine of respondeat superior does not apply to plaintiff’s claims under 42 U.S.C. § 1983 or termination in violation of public policy, because “the Town itself must have a custom or policy that is in violation of the law” and the Town had no policy that a “Town employee could not run for political office.”

(2) Under Rule 12(b)(6), plaintiff’s complaint failed to state a claim upon which relief could be granted due to the lack of a “pattern, practice, custom or usage” in violation of his constitutional rights.

(3) Under Rule 12(b)(7), “Town Officials” made the decisions plaintiff alleges are in violation of his rights and they were not made parties.

(4) Plaintiff’s evidence is too “speculative” to “rebut the Employment at Will presumption.”

Once again, defendant did not mention any claim of governmental immunity in its written motion for directed verdict or in argument to the trial court. The trial court granted defendant’s motion for directed verdict. We have had difficulty discerning why, although the trial court’s order essentially tracks defendant’s motion. The order says:

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[I]t appearing that after the Plaintiff had presented all of Plaintiff's evidence to the jury and Plaintiff had rested, the Defendant moved to dismiss the Plaintiff's case. Based upon the pleadings, facts and arguments of counsel, viewed in the light most favorable to the Plaintiff, the Court finds that Plaintiff has shown no lawful claim, and that Defendant's motion should be granted pursuant Rules 12(b)6, 12(b)7 and Rule 50 of the North Carolina Rules of Civil Procedure.

In seeking to understand this order, we have also considered the trial court's comments to the jury upon granting directed verdict. He stated:

Members of the jury, I appreciate your attention to this case so far, but at the end of the plaintiff's evidence I've dismissed the lawsuit, so there will be nothing for you to hear. I want to explain why I did that because I -- well, you're probably wondering about it and you're entitled to an explanation.

He first addressed the § 1983 claims:

[For] the Town of Sylva commissioners -- to be responsible for what their employees do that the plaintiff alleges was wrong, the commissioners either had to have a custom or policy that allowed it or directed it, they had to know it was happening -- these are alternatives -- or they had to know it was happening and did nothing about it, maybe a reckless indifference type standard, or perhaps they failed to adequately train their employees and that's why it was happening, but just because a municipal employee allegedly violated someone's rights under that federal statute does not make the town liable, and I think you understand what I'm saying.

I've heard -- perhaps there's been some testimony about some communication from a commissioner, but I didn't hear any evidence that the commissioners were the moving force behind any of this.

Now maybe employees, if you believe the plaintiff's evidence, were, but not the commissioners themselves, and that's why I dismissed the federal claims.

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He then addressed the claim for wrongful discharge:

Well, North Carolina law makes it clear you can't fire someone because of political things they do when they're not at work; that's wrong.

But you've also heard of sovereign immunity. You've heard of the cases where a -- for example, a state employee was driving a truck during his business and he hit somebody and hurts them. So that person says, "I'm going to sue the state." And perhaps you've heard about those cases where that lawsuit was thrown out because the judge says, "You cannot sue the state without their permission."

I remember I read some of those cases and I thought, well, that's kind of unfair. Well, it depends on who hits you, who runs over you, whether you get money back or not for your damages. And there's an exception for that. If the state or municipality has purchased liability insurance, then those lawsuits can proceed. But there's been no evidence about liability insurance in this case.

So that doctrine goes back to the common law and the law concerning the King of England. You couldn't sue the king without his permission. And there's all kinds of exceptions. I know you want me to go into them, but I won't.

Plaintiff timely filed a notice of appeal from the trial court's order granting directed verdict.

II. Analysis

a. Standard of review

The order on appeal was entered after presentation of the plaintiff's evidence at trial and is based upon Rule 50, despite its reference to Rules (12)(b)(6) and (7), so we must consider all of the evidence presented at trial in the light most favorable to plaintiff.

The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence

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to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury.

Davis v. Dennis Lilly Co., 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (citations omitted).

In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke University, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989). If the plaintiff has presented "more than a scintilla of evidence" to support each element of a claim, the trial court should deny directed verdict. *Bryant v. Thalheimer Bros., Inc.*, 113 N.C. App. 1, 6, 437 S.E.2d 519, 522 (1993). The trial court's ruling presents a question of law which we review *de novo* and "[t]his Court's review is limited to those grounds asserted by the moving party at the trial level." *Maxwell v. Michael P. Doyle, Inc.*, 164 N.C. App. 319, 323, 595 S.E.2d 759, 761-62 (2004) (citation and quotation marks omitted).

Our Supreme Court has noted that "where the question of granting a directed verdict is a close one, . . . the better practice is for the trial court to reserve its decision on the motion and allow the case to be submitted to the jury." *Turner*, 325 N.C. at 158, 381 S.E.2d at 710. If the case is submitted to the jury and the jury should return a verdict for the plaintiff, reserving the ruling on the motion for directed verdict and then granting a judgment notwithstanding the verdict also has the advantage of avoiding the need for another trial, should the directed verdict be reversed on appeal. See N.C. R. Civ. P. Rule 50 Comment, *Comment to this Rule as Originally Enacted* ("Under [Rule 50], whenever a motion for a directed verdict made at the close of all the evidence is not granted, it will be deemed that the judge submitted the case to the jury having reserved for later determination the legal question raised by the motion. Thus, if there is a verdict for the nonmovant or if for some reason a verdict is not returned, the judge can reconsider the sufficiency of the evidence and, if convinced that it is insufficient, can grant the motion. If, on appeal it should prove that the judge was correct, that is, that he properly granted the motion, then the appellate court can affirm and, in appropriate cases, order judgment entered for the movant. On the other hand, if it should

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prove that the trial judge improperly granted the motion, the appellate court is not restricted to granting a new trial, as under the prior practice, but can order judgment entered on the verdict.”).

b. Procedural posture

As we noted above, we need not dwell on details of the facts as presented at trial. Viewing the evidence in the light most favorable to plaintiff, he has presented “more than a scintilla” of evidence to support his claim he was fired because he was running for sheriff as a Republican. *Bryant*, 113 N.C. App. at 6, 437 S.E.2d at 522. His evidence also shows that the Chief’s decision was supported by the Town Manager, so her review of the termination was just a “rubber stamping” of the Chief’s decision, and that the defendant did not permit plaintiff to appeal this decision. Defendant certainly claims otherwise, but again, we must take plaintiff’s evidence as true and must draw all reasonable inferences in his favor. *See Davis*, 330 N.C. at 322, 411 S.E.2d at 138.

In addition, this case comes to us in a very unusual procedural posture, particularly for the legal issues involved. Although there are other cases addressing wrongful termination and 42 U.S.C. § 1983 claims, we cannot find any other case in North Carolina in which a directed verdict has been granted for a defendant, primarily based upon governmental immunity, where the defendant has neither pled nor argued governmental immunity as a defense. Moreover, while Rule 12(b)(6) was noted in defendant’s motion and the order granting directed verdict, a motion to dismiss under Rule 12(b)(6) considers whether the plaintiff’s complaint has stated a claim upon which relief may be granted, and this case had already proceeded to trial. Nevertheless, with those caveats, we will address the arguments on appeal.

c. Governmental Immunity

[1] We will first address the trial court’s *ex mero motu* dismissal of plaintiff’s state law claim for wrongful discharge based upon governmental immunity.¹ Defendant did not plead governmental immunity as an affirmative defense and did not move to dismiss on this basis. In all fairness to defendant, defendant did not seek to defend the trial court’s ruling on governmental immunity in its brief before this Court either. According to the trial court’s rendition of the reasons for dismissal and

1. It is not clear if the trial court relied upon governmental immunity to dismiss the other claims, but to the extent that the trial court’s rendition and order could be construed this way, the same analysis would apply.

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reference in the order to Rule(12)(b)(6)², the trial court relied solely or primarily on governmental immunity for the dismissal of plaintiff's wrongful termination claim under state law, so we must address it.

Governmental immunity is an affirmative defense, and like other forms of immunity, must be plead by the defendant.

First, as a complete bar to liability, governmental immunity constitutes an affirmative defense. As a defense, governmental immunity cannot, by definition, be raised until there is a lawsuit to defend against. Affirmative defenses are raised by a party's responsive pleading.

Clayton v. Branson, 170 N.C. App. 438, 449, 613 S.E.2d 259, 268 (2005) (citations omitted). Where a defendant does not raise the affirmative defense of governmental immunity, normally by a motion to dismiss or answer, it is waived. *See Burwell v. Giant Genie Corp.*, 115 N.C. App. 680, 684-85, 446 S.E.2d 126, 129 (1994) ("Qualified immunity is an affirmative defense that must be pleaded by the defendant. Ordinarily, the failure to plead an affirmative defense results in a waiver unless the parties agree to try the issue by express or implied consent. . . . Where a defendant does not raise an affirmative defense in his pleadings or in the trial, he cannot present it on appeal." (Citations and quotation marks omitted)).

Even if defendant had a potential affirmative defense of governmental immunity, *defendant* would have had to raise this defense or it is waived; the trial court cannot raise it for the defendant. And as defendant tacitly acknowledges and plaintiff notes, his 42 U.S.C. § 1983 claim under the United States Constitution would not be barred by governmental immunity absent an adequate state remedy. *See Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 338, 678 S.E.2d 351, 354 (2009) ("This Court could hardly have been clearer in its holding in *Corum [v. University of North Carolina]*, 330 N.C. 761, 413 S.E.2d 276 (1992)]: '[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution.' *Id.* at 782, 413 S.E.2d at 289."). Whether

2. Although governmental immunity is normally raised under either Rule12(b)(1) or (2), it can be raised under Rule 12(b)(6) as well. *See, e.g., Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 385, 677 S.E.2d 203, 207 (2009). In *Meherrin*, this Court addressed the defense of sovereign immunity under all three subsections of Rule 12, since the distinction was important in that case which involved an interlocutory appeal from an order denying the defendants' motion to dismiss based on sovereign immunity. *Id.* at 384-85, 677 S.E.2d at 207. The distinction is not important here, since the trial court granted the motion to dismiss and entered a final order.

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defendant had waived immunity for this type of claim by purchasing liability insurance coverage is irrelevant, since for a constitutional claim of this type, defendant would have had no immunity either way.

d. Violation of constitutional rights under 42 U.S.C. § 1983

[2] Although we have determined that the trial court erred to the extent it dismissed plaintiff's claims based on governmental immunity, both the order and the trial court's explanation of its ruling included another reason for dismissal, so we must consider if another legal basis could support a directed verdict order. The trial court's order did not address the sufficiency of the evidence, but based upon its statements to the jury, it appears that the trial court did *not* find the evidence to be insufficient to support plaintiff's claim. The trial court stated to the jury, "if we would have gone forward, *I don't know what you would have decided*, whether you would have decided that the firing was in response to [plaintiff] filing for sheriff, or maybe you wouldn't, I don't know. So I'm not basing my decision on whether someone was treated correctly or incorrectly." This statement implies that plaintiff presented sufficient evidence that the jury could potentially have ruled in his favor, if they found his evidence to be credible. The trial court also noted that the evidence showed that town employees had taken certain actions, but "not the commissioners themselves, and that's why I dismissed the federal claims." The trial court granted directed verdict based upon the defendant's argument that the doctrine of respondeat superior does not apply to plaintiff's claims under 42 U.S.C. § 1983 or termination in violation of public policy, because "the Town itself must have a custom or policy that is in violation of the law" and no evidence was presented that the Town in this case had a policy that a "Town employee could not run for political office." But plaintiff did not need to prove that the Town had a policy that Town employees could not run for political office. Plaintiff's claim was based on his allegation and evidence that Chief Woodard was the official with final policy-making authority as to hiring or firing in the police department, and that the Town Manager also concurred in the allegedly unconstitutional firing.

The United States Supreme Court explained this distinction in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986), with an analysis of a prior United States Supreme Court case, *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978):

Monell is a case about responsibility. In the first part of the opinion, we held that local government units could

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be made liable under § 1983 for deprivations of federal rights, overruling a contrary holding in *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961). In the second part of the opinion, we recognized a limitation on this liability and concluded that a municipality cannot be made liable by application of the doctrine of *respondereat superior*. See *Monell*, 436 U.S., at 691, 98 S. Ct., at 2036. In part, this conclusion rested upon the language of § 1983, which imposes liability only on a person who “subjects, or causes to be subjected,” any individual to a deprivation of federal rights; we noted that this language “cannot easily be read to impose liability vicariously on government bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor.” *Id.*, at 692, 98 S.Ct., at 2036. . . .

The conclusion that tortious conduct, to be the basis for municipal liability under § 1983, must be pursuant to a municipality’s “official policy” is contained in this discussion. The “official policy” requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts “of the municipality” – that is, acts which the municipality has officially sanctioned or ordered.

With this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body – whether or not that body had taken similar action in the past or intended to do so in the future – because even a single decision by such a body unquestionably constitutes an act of official government policy. . . . *Monell’s language makes clear that it expressly envisioned other officials “whose acts or edicts may fairly be said to represent official policy,” Monell, supra, 436 U.S., at 694, 98 S. Ct. at 2037-2038, and whose decisions therefore may give rise to municipal liability under § 1983.*

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Indeed, any other conclusion would be inconsistent with the principles underlying § 1983. . . . However, . . . a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

. . . .

Having said this much, we hasten to emphasize that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official – even a policymaking official – has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on the exercise of that discretion. *See, e.g., Oklahoma City v. Tuttle*, 471 U.S., at 822-824, 105 S. Ct., at 2435-2436. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.

Pembaur, 475 U.S. at 478-83, 89 L. Ed. 2d at 462-65, 106 S. Ct. at 1297-1300 (emphasis added).

According to plaintiff's evidence, defendant provided no process for its Commissioners to review the decisions of the Chief or Town Manager. Essentially, defendant's position is that even if its chief of police and town manager knowingly violated the constitutional rights of an employee, defendant can insulate itself from responsibility by having a policy it leaves these final decisions to these employees and it will not review any appeal by the wronged employee. This is not the law as established by the United States Supreme Court.

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When, however, an allegedly unconstitutional decision is made by an official with “final policy making authority,” then the municipality may be held liable for that official’s decision, so long as the decision was made by “the official or officials responsible under state law for making policy in *that area* of the city’s business.” *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988). Furthermore, as the Supreme Court explained in *Praprotnik*, the hallmark of municipal liability is the *finality* of the decision being reviewed: When an official’s discretionary decisions are constrained by policies not of that official’s making, those policies, rather than the subordinate’s departures from them, are the act of the municipality. Similarly, when a subordinate’s decision is subject to review by the municipality’s authorized policymakers, they have retained the authority to measure the official’s conduct for conformance with *their* policies. If the authorized policymakers approve a subordinate’s decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final. *Id.* at 127, 108 S. Ct. 915. In other words, even if the allegedly unconstitutional decision is initially made by a subordinate official, when that decision is appealed to and affirmed by an official with final authority over a matter, the municipality may be held liable for this affirmance.

Arendale v. City of Memphis, 519 F.3d 587, 601-02 (6th Cir. 2008).

We realize that defendant’s evidence may present a very different picture of defendant’s policies and procedures governing hiring and termination of employees, but unfortunately, since this case was dismissed after plaintiff’s evidence, we do not have the benefit of that evidence. We must take the plaintiff’s evidence as true and draw every reasonable inference in plaintiff’s favor, and if we do so, plaintiff presented sufficient evidence to survive the motion for directed verdict on his claims under 42 U.S.C. § 1983.

e. Failure to Join Necessary Party

[3] The trial court also noted that its order was based upon Rule 12(b)(7) of the Rules of Civil Procedure. Rule 12(b)(7) provides that “[e]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the

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following defenses may at the option of the pleader be made by motion: (7) Failure to join a necessary party.” Just as for Rule 12(b)(6), this is a rule normally invoked at the very beginning of a lawsuit, at the pleading stage, and defendant never requested joinder of any other parties. But even though defendant never requested joinder of any other parties, the trial court has the authority, and even the duty, to order joinder *ex mero motu*. See *Morganton v. Hutton & Bourbonnais Co.*, 247 N.C. 666, 668, 101 S.E.2d 679, 682 (1958) (“Whenever, as here, a fatal defect of parties is disclosed, the Court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the Court.”).

Since joinder of necessary parties is the only issue addressed by Rule 12(b)(7), and the order cites this rule, we assume that the trial court determined that there was some other person who was a necessary party.

A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party. When a complete determination of the matter cannot be had without the presence of other parties, the court must cause them to be brought in.

Booker v. Everhart, 294 N.C. 146, 156, 240 S.E.2d 360, 365-66 (1978) (citations omitted).

We cannot determine from the transcript, record, or order whom the trial court believed to be a necessary party or why, even if they may be proper parties, they would be *necessary*, so we cannot analyze whether they would be necessary parties. We express no opinion on whether any parties should be joined on remand. But in any event, if the trial court determined a necessary party had not been joined, dismissal of plaintiff’s case with prejudice would not be the appropriate result. Instead, the trial court should have continued the trial and ordered that any necessary party be joined. “[D]ismissal under Rule 12(b)(7) is proper only when the defect cannot be cured, and the court ordinarily should order a continuance for the absent party to be brought into the action and plead.” *Howell v. Fisher*, 49 N.C. App. 488, 491, 272 S.E.2d 19, 22 (1980).

There is nothing in the record to indicate that “the defect” (if any) could not be cured, since we do not know who the alleged necessary party or parties are. And if a necessary party is not subject to the court’s

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jurisdiction, dismissal with prejudice still would not be the appropriate result. Even if a party ordered to be joined as a necessary party is not subject to the court's jurisdiction, the

dismissal for failure to join a necessary party is not a dismissal on the merits and may not be with prejudice. The same is true, of course, where the party ordered joined is not a necessary party but is a proper party which the court, in its discretion, decides should be joined. The following language relating to Rule 12(b)(7) of the Federal Rules of Civil Procedure is applicable also to our Rule 12(b)(7): When faced with a motion under Rule 12(b)(7), the court will decide if the absent party should be joined as a party. If it decides in the affirmative, the court will order him brought into the action. However, if the absentee cannot be joined, the court must then determine, by balancing the guiding factors set forth in Rule 19(b), whether to proceed without him or to dismiss the action. A dismissal under Rule 12(b)(7) is not considered to be on the merits and is without prejudice.

Carding Developments v. Gunter & Cooke, 12 N.C. App. 448, 453-54, 183 S.E.2d 834, 838 (1971) (citations, quotation marks, and ellipses omitted).

To the extent that the trial court dismissed plaintiff's claims based upon failure to join a necessary party, it erred, and we must reverse the order.

III. Conclusion

Because the trial court granted directed verdict based upon a misapprehension of the law regarding plaintiff's claims under 42 U.S.C. § 1983 and erred in dismissing any claims based upon governmental immunity since it was never pled by defendant, we reverse the order granting directed verdict and remand for a new trial on all claims. On remand, before proceeding with another trial, the trial court should allow the parties to be heard on whether any necessary or proper parties should be joined, and the trial court should enter any appropriate orders regarding those parties so all parties may be joined before the matter is set again for trial. But again, we express no opinion on whether any necessary or proper parties should be joined; we address this issue only because the trial court's order addressed it and to provide procedural guidance on remand.

REVERSED AND REMANDED.

Judges ELMORE and TYSON concur.

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[259 N.C. App. 308 (2018)]

CARRA JANE PENEGAR, WIDOW AND EXECUTRIX OF THE ESTATE OF JOHNNY RAY
PENEGAR, DECEASED EMPLOYEE, PLAINTIFF

v.

UNITED PARCEL SERVICE, EMPLOYER, LIBERTY MUTUAL
INSURANCE CO., CARRIER, DEFENDANTS

No. COA17-404

Filed 1 May 2018

1. Workers' Compensation—findings—injurious exposure—asbestos

The Industrial Commission's findings that decedent was exposed to asbestos at elevated levels while he was employed with defendant UPS and was injured as a result were supported by competent evidence, including witness testimony that the truck brakes used by UPS during decedent's employment contained asbestos and defendant was exposed daily during the course of his employment.

2. Workers' Compensation—last injurious exposure—asbestos—subsequent exposure

Where plaintiff (decedent's wife) presented evidence that decedent was injuriously exposed to asbestos during his employment at UPS, and where no evidence was presented that decedent was exposed to asbestos during his subsequent employment, the Industrial Commission's finding that decedent's last injurious exposure occurred during his employment with UPS was supported by competent evidence. In the absence of evidence that an employee was exposed to a hazardous material during subsequent employment, the burden shifts to the employer to produce some evidence of subsequent exposure.

3. Workers' Compensation—modification of award—by full Commission—average weekly wages—issue not raised by parties

The Industrial Commission had jurisdiction to revise the Deputy Commissioner's calculation of decedent's average weekly wage even though that issue was not raised by either party.

4. Workers' Compensation—average weekly wages—statutory factors—fifth method

The Court of Appeals affirmed the Industrial Commission's calculation of decedent's average weekly wages in an asbestos case where the first four statutory methods of calculation in N.C.G.S. § 97-2 were either inapplicable or would produce an unjust result and the Commission accordingly used the fifth method.

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Appeal by Plaintiff and Defendants from an Opinion and Award entered 8 December 2016 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 18 October 2017.

Wallace and Graham, P.A., by Michael B. Pross, for Plaintiff-Appellant.

Goodman McGuffey, LLP, by Jennifer Jerzak Blackman, for Defendants-Appellants.

INMAN, Judge.

The North Carolina Industrial Commission (the “Commission”) did not err in finding that an employee’s last injurious exposure to asbestos, which contributed to his development of an occupational disease, occurred during the thirty years he worked for his primary lifetime employer, based on the testimony of his former co-workers and medical experts, and in the absence of any evidence that he was exposed to asbestos at any subsequent job. Nor did the Commission err in calculating the employee’s average weekly wage based upon the employee’s earnings in the year immediately preceding his diagnosis.

This case arises out of a workers’ compensation claim filed by Johnny Ray Penegar (“Decedent”) against United Parcel Service (“Employer” or “UPS”) and Liberty Mutual Insurance Company (“Carrier”) (collectively “Defendants”), asserting compensation for Decedent’s mesothelioma. Carra Jane Penegar (“Plaintiff”), Decedent’s wife and executrix of his estate, was substituted as Plaintiff following Decedent’s death on 26 March 2015 during the pendency of this action. Both parties appeal from the opinion and award of the Full North Carolina Industrial Commission, which awarded Plaintiff compensation for all of Decedent’s medical expenses associated with his diagnosis of mesothelioma, total disability compensation, burial expenses, and death benefits.

Defendants argue that the Commission’s findings that Plaintiff was injuriously exposed to asbestos while employed by UPS and that Plaintiff’s last injurious exposure to asbestos occurred at UPS are unsupported by competent evidence.

Plaintiff argues that the Commission lacked jurisdiction to revise the Deputy Commissioner’s calculation of the average weekly wage, and, assuming jurisdiction, that the Commission’s calculation was incorrect. Additionally, Plaintiff asserts that the Commission failed to address the issue, raised by Plaintiff on appeal from the Deputy Commissioner’s

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opinion and award, of the appropriate maximum compensation rate to be applied to Decedent's claim. After careful review, we affirm the Commission's finding that Decedent's last injurious exposure to asbestos occurred while Decedent was employed with UPS. We also affirm the Commission's recalculation of Decedent's average weekly wage. We dismiss as moot Plaintiff's appeal from the Commission's failure to address the Deputy Commissioner's calculation of the maximum compensation rate.

Factual and Procedural History

Decedent worked for UPS for thirty years, from 1967 until 1998, as a feeder driver based in UPS's Charlotte facility. Decedent's duties included driving a tracker-trailer to destinations within 200 miles and back each day. The Charlotte facility was a large, open building approximately the size of two or three football fields, in which the main area, referred to by employees as the "shop," consisted of various unseparated bays designated "tractor shop" or "package car shop" depending on what vehicles were being repaired or maintained in each. Decedent walked through the shop nearly every day to get from his truck to the employee locker room. Decedent would often stop in the shop to talk with mechanics while they worked.

UPS employed its own mechanics to service the vehicles in its fleet during the entirety of Decedent's employment. Standard service tasks included maintaining and repairing brakes. In any given week, between three and seven brake jobs were performed in the shop. A typical brake job included banging the brake drums on the ground and using compressed air to clear off the brake dust. The brake pads used by UPS during Decedent's employment contained asbestos, and would release asbestos fibers into the air during brake jobs. Starting in the mid-1980s, UPS provided protective masks to the mechanics, but did not at any time provide a protective mask to Decedent.

Following his employment with UPS, from 1999 until 2002, Decedent drove a transfer van for Union County. He also worked for a church and for Union County Schools. Decedent continued to work part-time until 2012.

On 8 February 2013, Decedent was diagnosed with mesothelioma. Prior to his death on 26 March 2016, Decedent filed a claim with the Commission alleging that his mesothelioma developed as a result of asbestos exposure during his employment with UPS.

Plaintiff presented testimony from two former UPS mechanics and two medical experts. The mechanics testified that asbestos was present

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at the Charlotte facility. The medical experts testified that exposure to asbestos in the UPS facility caused Decedent to develop mesothelioma or contributed to him developing that disease. Defendants presented two expert witnesses—an expert in industrial hygiene and an expert in pathology.

The Deputy Commissioner issued an opinion and award finding that Decedent was last injuriously exposed to asbestos, and the hazards of developing mesothelioma, during his employment with UPS. The Deputy Commissioner awarded Plaintiff 500 weeks of wage compensation, calculated using Decedent's average weekly wage from 1998 of \$690.10, the last year he worked for UPS, and limited by the maximum compensation rate for 1998, so that Plaintiff was awarded \$532.00 per week. The opinion and award also compensated Plaintiff for the medical expenses incurred treating Decedent's mesothelioma.

Plaintiff filed a motion for reconsideration of the maximum compensation rate, arguing that the Deputy Commissioner should have used the maximum compensation rate from 2015—the date of Decedent's death. The Deputy Commissioner denied Plaintiff's motion.

Both parties appealed to the Full Commission. Defendants challenged a majority of the Deputy Commissioner's findings of fact and all but one of the conclusions of law. Plaintiff challenged only the Deputy Commissioner's calculation of the appropriate maximum compensation rate.

The Commission, on 8 December 2016, issued its opinion and award finding that Decedent's last injurious exposure to asbestos, and the hazards of mesothelioma, occurred while he was employed with UPS. The Commission recalculated and substantially reduced Decedent's average weekly wage, based on Decedent's earnings in the year prior to his diagnosis with mesothelioma, when he was no longer employed by UPS. Both parties appealed.

Analysis

I. Standard of Review

“Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact.” *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006) (citation omitted). Unchallenged findings of fact are presumed to be supported by competent evidence, and findings of fact supported by competent evidence are binding on

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appeal. *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009). The Commission's conclusions of law are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

II. Defendants' Appeal

Defendants challenge the Commission's findings that (1) the brakes used by UPS at its Charlotte facility while Decedent was employed there contained asbestos and (2) Decedent was at an increased risk of asbestos exposure during his employment with UPS. Defendants also argue that Plaintiff failed to present evidence that Decedent was not exposed to asbestos during his subsequent employments, and therefore, the Commission's finding that Decedent's *last* injurious exposure to asbestos occurred at UPS is also unsupported by the evidence. We disagree.

A. Injurious Exposure

[1] Defendants challenge the following findings of fact made by the Full Commission:

9. Vernon Thomas Pond worked as a mechanic for defendant-employer from 1972 to 2003 in the same facility as decedent. Mr. Pond testified, based upon his work and experience as a mechanic, that all brake shoes he worked on while employed by defendant-employer contained asbestos.

10. Bobby Bolin also worked for defendant-employer in mechanics, mostly performing maintenance on tractors and trailers. He began working for defendant-employer in or about 1967. Mr. Bolin testified that the work environment was "pretty dusty" and, even though he knew brakes contained asbestos as early as 1967, he was not aware that asbestos dust "was bad" until the mid-1980s. Mr. Bolin testified that defendant-employer provided mechanics with masks to protect against dust exposure in the mid-1980s and restricted the blowing of dust in the shop, but other employees walking through the shop were not provided with protective masks.

...

12. Based upon the preponderance of the evidence in view of the entire record, the Commission finds that the brakes utilized by defendant-employer in the maintenance of its trucks, tractors, and trailers contained asbestos. The

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competent and credible evidence of record demonstrates that such brakes contained asbestos from the mid-1960s until at least the mid-1980s and, to the extent the brakes continued to contain asbestos from the mid-1980s until decedent's retirement, decedent was not supplied with a protective mask to curtail his exposure to asbestos fibers while in the shop.

...

23. Dr. Harpole testified that, although decedent did not have "a giant exposure" to the hazards of asbestos like someone who worked in an asbestos factory, being around aerosolized asbestos in the air daily, or even every few days over a period of years, led to significant asbestos exposure for decedent when he walked through defendant-employer's shop.

24. Dr. Harpole testified that decedent's mesothelioma was caused by exposure to asbestos and, more likely than not, that decedent's work for defendant-employer caused or significantly contributed to his development of mesothelioma. He further testified that decedent's exposure to asbestos in his employment with defendant-employer placed him at an increased risk, over that faced by the general public, for developing mesothelioma.

25. Dr. Harpole's opinions on causation and increased risk were based on his understanding that, although decedent did not perform brake work for defendant-employer, he did walk through the shop daily or every few days over the period of many years while brake jobs were being performed and brake dust was aerosolized. Dr. Harpole testified that if the mechanics were not "grinding" brakes, then it would make the causation and increased risk less likely, however, Dr. Harpole testified that, even if defendant-employer's mechanics did not grind brakes, the use of compressed air aerosolized the asbestos fibers in the brakes, which would have been the key to decedent's exposure.

26. From 1957 until 1960, decedent served in the U.S. Navy as a machinist mate aboard a ship, the U.S.S. Uhlmann, and was likely exposed to the hazards of asbestos during that time. However, Dr. Harpole testified that decedent likely

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had a protracted exposure over time, which he explained “is much more of a risk for forming cancer than one giant exposure.” Dr. Harpole further explained that the amount of plaque in decedent’s lungs suggested a longer-term exposure than what decedent would have experienced during his three to four years in the Navy.

...

28. Dr. Barry Horn is a pulmonologist and critical care specialist with experience evaluating and treating asbestos-related diseases, including mesothelioma. Plaintiff tendered Dr. Horn as an expert in pulmonary medicine and asbestos-related diseases, including mesothelioma, without objection from defendants. Dr. Horn never personally evaluated decedent, but reviewed the medical records and deposition testimony related to this case and generated a written report summarizing his conclusions and opinions.

29. Dr. Horn understood that decedent incurred asbestos exposure in his employment with defendant-employer when he walked through the maintenance areas of the shop twice each work day, when he presented for work and then when he left work at the end of his shift, over a period of decades. Dr. Horn further understood that the brake work in the shop decedent walked through did not involve “grinding,” but replacement work that would release asbestos fibers into the air for prolonged periods of time.

30. Dr. Horn testified that, “to get mesothelioma, it requires remarkably little exposure to asbestos.” Dr. Horn explained that, even though residual brake dust contains anywhere between 1 and 10 percent of asbestos, that amount is still significant enough to cause mesothelioma. Dr. Horn testified, “When you blow out the dust, we’re talking about a lot of fibers in the air, so even if it’s one percent or less [than] one percent, we’re talking about a lot of fibers now.”

31. Dr. Horn testified that an individual’s risk for developing asbestos-related illness is dose dependent, meaning “[t]he more asbestos you inhale and retain in your lungs, the more likely you’ll develop an asbestos-related illness and that includes mesothelioma.” Dr. Horn explained that,

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because decedent walked back and forth in defendant-employer's premises and breathed asbestos fibers as a consequence of his job over a period of decades, his exposure to asbestos was a substantial contributing factor in his risk for developing mesothelioma.

32. Dr. Horn further testified that decedent's employment with defendant-employer placed him at an increased risk, over that faced by the general public, for the development of mesothelioma, because "the general public is not exposed to levels of asbestos that would have existed in [defendant-employer's] facility" where brake repair was being performed.

...

35. There was no question for Dr. Horn that the brake linings defendant-employer used in the 1960s, '70s, and '80s contained chrysotile asbestos. As he testified, these brake linings may also have contained the more potent form of tremolite, or amphibole, asbestos. Dr. Horn reviewed several publications during the course of his deposition that concluded that, regardless of whether brake linings contained amphibole asbestos, or only chrysotile asbestos, exposure to the asbestos dust of either form could cause mesothelioma, and he agreed with those conclusions. Dr. Horn also explained that all government agencies in the United States take the position that chrysotile asbestos, alone, can cause mesothelioma, and that the doses of chrysotile do not have to be extremely high to do so.

36. As to "background" asbestos exposures, Dr. Horn agreed with Dr. Harpole that everyone receives some level of exposure, but testified that in order for him to conclude that someone has asbestos-related disease, their asbestos exposure has to be greater than background exposure.

37. Dr. Horn testified, and the Commission finds as fact, that decedent was clearly exposed to hazardous levels of asbestos during his Navy service, but decedent continued to have asbestos exposure thereafter while working for defendant-employer, and it was the latter exposure that either caused or substantially contributed to decedent's development of mesothelioma.

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...

47. Dr. Roggli testified that the brake products that were likely in use by defendant-employer during decedent's employment contained chrysotile asbestos, but it was his opinion that chrysotile asbestos from friction products could not cause mesothelioma. Dr. Roggli did allow, though, that exposure to chrysotile mined from Canada, which generally is contaminated with tremolite (a more potent amphibole type of asbestos) could cause mesothelioma.

...

50. The Commission accords greater weight to the causation and increased risk opinions of Dr. Harpole and Dr. Horn over that of Mr. Agopsowicz and Dr. Roggli. Drs. Harpole and Horn have extensive experience specializing in the diagnosis and treatment of mesothelioma. Dr. Harpole served as decedent's treating physician, which afforded him an opportunity to discuss directly with decedent his lifetime exposures to asbestos, and to form his opinions on causation and increased risk therefrom. Further, the Commission finds Dr. Horn's opinions are well-reasoned, supported by research and a lifetime of study in the field of pulmonology, and in accord with those opinions of Dr. Harpole.

51. The Commission finds Dr. Roggli's opinions regarding an individual's cumulative exposures to asbestos and risk of developing mesothelioma contradictory when applied to decedent specifically and, therefore, assigns little weight to the expert opinions of Dr. Roggli. The Commission also assigns little weight to the testimony of Mr. Agopsowicz, who admits he is not qualified to render an opinion on causation in connection with decedent's development of mesothelioma.

52. The preponderance of the evidence in view of the entire record establishes that decedent was exposed to greater than background levels of asbestos during his service in the Navy in the 1950s and throughout his employment with defendant-employer from 1967 through 1998.

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53. Based on the preponderance of the evidence in view of the entire record, the Commission finds that decedent's last injurious exposure to the hazards of asbestos occurred during his employment with defendant-employer.

54. The preponderance of the evidence in view of the entire record establishes that decedent's work for defendant-employer exposed him to a greater risk of contracting mesothelioma over the general public, due to his above-background levels of asbestos exposure in the course of his employment, and that such exposure was a significant contributing factor to his development of mesothelioma.

55. The preponderance of the evidence in view of the entire record further establishes that mesothelioma caused or significantly contributed to decedent's death.

Defendants' challenge to the weight the Commission assigned to testimony is beyond our scope of review. *See Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) ("[O]n appeal, this Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" (quoting *Anderson v. Lincoln Const. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965))). Instead, we review the challenged findings only to determine whether they are supported by competent evidence. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

The Commission's findings are consistent with the witnesses' testimonies and therefore are supported by competent evidence. Mr. Pond testified that he worked with UPS as a mechanic at the Charlotte facility from 1972 until 2003. He further testified that it was his knowledge that all brake pads, including those used by UPS during Decedent's employment, contained asbestos, and that it was common practice for the mechanics to knock the brake drums on the floor and to use compressed air to clean the brake dust from the drums. Mr. Bolin testified that it was his understanding that the brake pads used by UPS contained asbestos, and that it was not until the 1980s that UPS began providing protective masks—and then only to the mechanics. Both witnesses testified that they frequently saw Decedent in the shop where these brake jobs were performed. Based on this testimony alone, the Commission's findings that (1) the brakes used by UPS during Decedent's employment contained asbestos and (2) Decedent was exposed to increased levels of asbestos beyond that of the general public are supported by competent evidence.

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The testimonies of Drs. Harpole and Horn, the medical experts called by Plaintiff, also provide competent evidence to support the Commission's findings of fact. Defendants argue that their expert witnesses, Mr. Agopsowicz and Dr. Roggli, offered testimony that contradicts the testimony of Plaintiff's witnesses. However, as we mentioned above, it is not within this Court's authority to reweigh the evidence and credibility of the witnesses. The Commission explicitly found that Plaintiff's expert witnesses presented more credible testimony than Defendants' expert witnesses, and, because the Commission is the sole judge of credibility, the Commission's findings must stand. *See, e.g., Adams*, 349 N.C. at 680, 509 S.E.2d at 413 ("The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." (citation omitted)).

Accordingly, we hold that the Commission's findings that while employed with UPS, Decedent was exposed to asbestos at levels above those of the general public and was injured as a result are supported by competent evidence.

B. Last Injurious Exposure

[2] Defendants also challenge the Commission's finding that Decedent's last injurious exposure occurred while Decedent was employed by UPS.

"In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was *last injuriously exposed* to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable." N.C. Gen. Stat. § 97-57 (2015) (emphasis added). The North Carolina Supreme Court, in *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E.2d 359 (1983), explained that "[t]he statutory terms 'last injuriously exposed' mean 'an exposure which proximately augmented the disease to any extent, however slight.'" 308 N.C. at 89, 301 S.E.2d at 362-63 (citation omitted). Therefore, the Court concluded that to succeed, a plaintiff need only show: "(1) that she has a compensable occupational disease and (2) that she was 'last injuriously exposed to the hazards of such disease' in [the] defendant's employment." *Id.* at 89, 301 S.E.2d at 362.

The Commission found that "[t]here is no evidence of record that any of [Decedent's subsequent] jobs exposed decedent to the hazards of asbestos." Defendants concede that, as written, this finding is factually true. We note that this finding, in turn, is logically consistent with the Commission's finding that Decedent's last injurious exposure to asbestos

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occurred at UPS—because if there is no evidence of later exposure, the last exposure must necessarily have occurred at UPS.

Defendants argue that it is precisely because there is no evidence of record regarding Decedent's asbestos exposure at his subsequent employment that the Commission erred in finding that "decedent's last injurious exposure to the hazards of asbestos occurred during his employment with defendant-employer." Defendants argue that Plaintiff failed to carry the burden to present evidence that Decedent was not exposed to asbestos in his employment subsequent to his employment with UPS.

Defendants' argument is premised on the theory that in order for the Commission to find that Decedent's last exposure was at UPS, it must first find, based on specific evidence presented by Plaintiff, that Decedent was not later exposed at his subsequent employers. We reject this argument based upon precedent and the legislative purpose of the Workers' Compensation Act.

Our courts have consistently held that the Workers' Compensation Act "should be liberally construed so that the benefits under the Act will not be denied by narrow, technical or strict interpretation." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972) (citation omitted). Moreover, the purpose of the "last injurious exposure" doctrine is "to eliminate the need for complex and expensive litigation of the issue of relative contribution by each of several employments to a plaintiff's occupational disease." *City of Durham v. Safety Nat. Cas. Corp.*, 196 N.C. App. 761, 764, 675 S.E.2d 393, 395 (2009). The doctrine provides a plaintiff with a reduced burden by requiring only a showing that the occupational exposure augmented a disease, "however slight[.]" as opposed to demonstrating how much each exposure resulted in the disease. *See Rutledge*, 308 N.C. at 89, 301 S.E.2d at 362.

Defendants' assertion that the Commission's finding is not supported by the evidence misreads the Commission's finding. The Commission found that there was no evidence that Decedent was exposed to asbestos during his subsequent employment, not, as Defendants argue, that there was no evidence regarding Decedent's exposure during his subsequent employment. This distinction, however minor, is essential, as we are bound by the Commission's findings when those findings are supported by the evidence in the record. Here, the Commission's finding that there is no evidence that Decedent was exposed to asbestos is supported by the record because there is no evidence that he was exposed to asbestos. Moreover, this finding supports the Commission's

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finding that Decedent's last injurious exposure to asbestos was while he was employed by UPS.

In sum, we hold that in the absence of evidence that an employee was exposed to a hazardous material at subsequent employers, the burden shifts to the employer to produce some evidence of a subsequent exposure. Shifting the burden of production does not shift the burden of proof. But before the Commission can find that an employee was exposed to a hazardous condition at some subsequent employment, the record must include some evidence of exposure in that employment.

In *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 524 S.E.2d 368 (2000), the plaintiff worked as a typist from 1988 until 1993 for the defendant-employer, during which time she began suffering from symptoms associated with overuse tendinitis of the arms. *Id.* at 352, 524 S.E.2d 370. The plaintiff resigned from her position and worked in several subsequent jobs, including at a department store, a fast food restaurant, and a gas and convenience store. *Id.* at 352-53, 524 S.E.2d at 370. Our Court held that the evidence in the record—the plaintiff's job duties, medical evidence indicating a worsening of her condition, and the plaintiff's own testimony that her symptoms were aggravated by her subsequent jobs—supported the Commission's finding that her last injurious exposure to carpal tunnel syndrome occurred while she worked with her subsequent employers, not while she worked with the defendant-employer. *Id.* at 359-60, 524 S.E.2d at 374.

In contrast to *Hardin*, this Court in an unpublished decision, *Richardson v. PCS Phosphate Co.*, 238 N.C. App. 198, 768 S.E.2d 64, 2014 WL 714977 (2014) (unpublished), affirmed an opinion and award of the Commission finding that a plaintiff's last injurious exposure to asbestos, which resulted in his diagnosis of mesothelioma, occurred during his time with the defendant-employer ("PCS") and not at his subsequent employment ("East Group"). The plaintiff worked for the defendant-employer, a phosphate products manufacturer, as a concentrator engineer before eventually rising to the rank of assistant mine manager. *Id.* at *1-*2. The only finding by the Commission addressing the plaintiff's subsequent employer stated:

After retiring from PCS, [the] [p]laintiff began working for the East Group in 1995 on the same PCS job site. [The] [p]laintiff testified that in this position, he performed the same job duties as he had while employed as Assistant to the Mine Manager. [The] [p]laintiff does not believe that he was injuriously exposed to the hazards of asbestos while working for the East Group.

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Id. at *8. Our Court explained that “[b]esides [the] plaintiff’s own testimony that he performed essentially the same work at the same locations, there was no evidence presented as to whether asbestos was still present in the areas that [the] plaintiff visited while working for the East Group, whether there was asbestos maintenance or abatement projects going on after 1995, whether [the] plaintiff’s activities in those same areas could have exposed him to asbestos after 1995, and no expert medical evidence linking [the] plaintiff’s work at the East Group with his mesothelioma.” *Id.* at *8. This Court held, in the absence of evidence “establishing the nexus between [the] plaintiff’s continuing work at the PCS facility for the East Group and exposure to asbestos[,] . . . we are unable to conclude that the Full Commission erred in failing to find that [the] plaintiff’s ‘last injurious exposure’ occurred while he was working for the East Group.” *Id.* at *8. Defendants’ appeal here, as the appeal in *Richardson*, challenges the Commission’s finding that a plaintiff’s last injurious exposure occurred with the defendant-employers. While *Richardson* is not binding authority, given the paucity of decisions regarding the issue before us, its reasoning is persuasive.

The purpose of the Workers’ Compensation Act and our precedent support the Commission’s finding that, in the absence of evidence that Decedent was exposed to asbestos or any other substance causing mesothelioma during his subsequent employment, Decedent’s last injurious exposure to asbestos occurred at UPS. To require a plaintiff to present affirmative evidence that no exposure existed during all subsequent employment would impose a burden in stark conflict with purpose of the last injurious exposure doctrine and the general purpose of the Workers’ Compensation Act.

Here, Plaintiff provided competent evidence that Decedent was injuriously exposed to asbestos during his employment with UPS and that his exposure contributed to his development of mesothelioma. While there is no affirmative evidence proving a lack of exposure to asbestos in his subsequent employment, nothing in the evidence regarding his subsequent employment—as a van driver and a church and school employee—suggests any inference to the contrary. Without any such evidence, it would have been error for the Commission to find that Decedent was later exposed.

We recognize that it is a plaintiff’s burden to prove his claim is compensable, see *Henry v. A.C. Lawrence Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950), and hold that under the facts presented, Plaintiff has done so. Based on the record, and in the absence of any evidence establishing a nexus between Plaintiff’s subsequent employment and

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asbestos exposure, we conclude the Commission did not err in finding that Plaintiff's last injurious exposure to asbestos was at UPS.

III. Plaintiff's Appeal

Plaintiff argues that the Commission lacked jurisdiction to revise a determination made by a Deputy Commissioner in an opinion and award, when that issue was not raised by either party, and, assuming jurisdiction, that the Commission erred in calculating Plaintiff's average weekly wage and maximum compensation rate. We hold the Commission had jurisdiction and properly calculated Plaintiff's average weekly wage, but did not make a determination as to the proper maximum compensation rate.

A. Jurisdiction to Revise an Opinion and Award

[3] It is well-established in North Carolina that the Industrial Commission has the authority to review, modify, adopt, or reject the findings of fact found by a deputy commissioner. *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962). The Commission also has "the power to review the evidence, reconsider it, receive further evidence, rehear the parties or their representatives, and, if proper, to amend the award . . ." *Id.* at 182, 123 S.E.2d at 613 (emphasis added). Inherent in these powers, our courts have long recognized the Full Commission's authority to "strike [a] deputy commissioner's findings of fact even if no exception was taken to the findings." *Keel v. H & V Inc.*, 107 N.C. App. 536, 542, 421 S.E.2d 362, 367 (1992).

Plaintiff argues that this Court's recent holding in *Reed v. Carolina Holdings*, __ N.C. App. __, 796 S.E.2d 102 (2017), restricts the scope of issues the Commission may address on appeal from a deputy commissioner's opinion and award. In *Reed*, we held that pursuant to Rule 701 of the North Carolina Industrial Commission we were without jurisdiction to address an argument raised, for the first time on appeal, by the defendant. *Id.* at __, 796 S.E.2d at 108. This holding, however, refers only to this Court's jurisdiction to hear arguments not asserted, or ruled upon, below; it does not address the Commission's authority to review, modify, or amend a deputy commissioner's opinion and award when an issue is not raised by the parties. The Commission's authority under the Rules promulgated by the Commission has previously been addressed by the North Carolina Supreme Court. In *Brewer*, the Court explained that "these rules do not limit the power of the Commission to review, modify, adopt, or reject the findings of fact found by a Deputy Commissioner . . ." 256 N.C. at 182, 123 S.E.2d at 613. Accordingly, we hold that the Commission was well within its authority and therefore had jurisdiction

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to amend an aspect of the Deputy Commissioner's opinion and award, even those not raised by either party on appeal.

B. Average Weekly Wage

[4] "The determination of the plaintiff's 'average weekly wages' requires application of the definition set forth in the Workers' Compensation Act, and the case law construing that statute[,] and thus raises an issue of law, not fact." *Boney v. Winn Dixie, Inc.*, 163 N.C. App. 330, 331-32, 593 S.E.2d 93, 95 (2004) (internal quotation marks and citations omitted). We therefore review the Commission's calculation of Decedent's average weekly wages *de novo*. *Id.* at 331-32, 593 S.E.2d at 95.

Section 97-2(5) of the North Carolina General Statutes " 'provides a hierarchy' of five methods of computing the average weekly wages[.]" *McAninch v. Buncombe Cty. Schools*, 347 N.C. 126, 130, 489 S.E.2d 375, 378 (1997) (citation omitted). "The five methods are ranked in order of preference, and each subsequent method can be applied only if the previous methods are inappropriate." *Tedder v. A & K Enterprises*, 238 N.C. App. 169, 174, 767 S.E.2d 98, 102 (2014) (citation omitted). Section 97-2(5) states in relevant part:

[Method 1] "Average weekly wages" shall mean the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . divided by 52;

. . .

[Method 2] if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted.

. . .

[Method 3] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained.

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...

[Method 4] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

...

[Method 5] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C. Gen. Stat. § 97-2 (2015). “The final method, as set forth in the last sentence, clearly may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods.” *McAninch*, 347 N.C. at 130, 489 S.E.2d at 378 (citation omitted).

The first three methods calculate the average weekly wages for an employee based on the employee’s actual employment with the employer in the 52-week time period immediately preceding the date of injury. Here, the Commission determined, and we agree, that these methods are inappropriate because of the length of time between Decedent’s employment and his diagnosis. The Commission found that Decedent’s date of injury¹ was 8 February 2013, and that Decedent had not worked for UPS at any time in the 52 weeks immediately prior this date.

Regarding the fourth method, the Commission found that “[t]he record contains no evidence by which calculation of decedent’s average weekly wage can be made” This determination makes sense because the fourth method applies to employees who worked for only a short time for the defendant employer. Decedent worked for UPS for thirty years and had not worked for them in the fifteen years immediately prior to his diagnosis.

1. The Commission correctly notes that “the date of diagnosis” with regard to an occupational disease constitutes the “date of injury[.]” for the purposes of calculating average weekly wages. See *Pope v. Manville*, 207 N.C. App. 157, 168-69, 700 S.E.2d 22, 30 (2010).

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The Commission then found, consistent with the requirements of *McAninch*, 347 N.C. at 130, 489 S.E.2d at 378, that because “the first four statutory methods for calculating average weekly wage are either inapplicable or would produce a result that is not fair and just to both parties . . . the Commission finds that it is appropriate to use the fifth method to calculate average weekly wage.” We agree with the Commission’s findings.

The Commission, in applying the fifth method, sought to determine a way to produce a result that “most accurately reflects the wages decedent would have continued to earn, but for his diagnosis with mesothelioma, and [that] is fair and just to both parties.” The Commission looked at Decedent’s earnings for 2012 from his employment with Union County—\$4,272.92—which were evidenced by Decedent’s Social Security Earnings Statement.² The Commission then divided this amount by 52 weeks and obtained an average weekly wage of \$82.17 with a resulting compensation rate of \$54.78 for Decedent. Decedent’s Social Security Earnings Statement is competent evidence that supports the Commission’s findings, and therefore, we are bound by such findings on appeal.

Plaintiff argues that this calculation of average weekly wages is improper because it does not reflect Decedent’s 2012 part-time post-retirement earning capacity. We reject this argument. Section 97-2 explicitly provides that the weekly calculation using the fifth method should “most nearly approximate the amount which the injured employee *would be* earning were it not for the injury[,]” not what the injured employee *could be* earning. N.C. Gen. Stat. § 97-2. Because there was evidence in the record of Decedent’s actual earnings in the years prior to his diagnosis, the Commission’s findings are supported by such evidence, and we affirm the Commission’s calculation of Decedent’s average weekly wages.

C. Maximum Compensation Rate

It is well established in North Carolina that “it is the duty and responsibility of the full Commission to decide all of the matters *in controversy* between the parties.” *Hurley v. Wal-Mart Stores, Inc.*, 219 N.C. App. 607, 613, 723 S.E.2d 794, 797 (2012) (internal quotation marks and citation omitted) (emphasis added). Plaintiff’s appeal to the Full Commission challenged the Deputy Commissioner’s determination of the maximum compensation rate, but the Commission did not decide that issue. However, the average weekly wage calculated by the Commission fell far below the maximum compensation rate, so that

2. Decedent’s Social Security Earnings Statement includes Decedent’s earnings for the years prior to his diagnosis, which indicate a decline in earning from 2008, \$9,774.78, to 2012, \$4,272.92.

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Plaintiff's award was not subject to any limitation by the latter. Because we affirm the Commission's calculation of the average weekly wage, and because the calculated average weekly wage falls far short of any of the argued maximum compensation rates, Plaintiff's appeal of the issue is moot. Accordingly, we dismiss as moot Plaintiff's appeal of the maximum compensation rate.

Conclusion

For the foregoing reasons, we affirm the Commission's finding of fact that Decedent's last injurious exposure to asbestos occurred while Decedent was employed by UPS and we affirm the Commission's recalculation of Decedent's average weekly wage. We dismiss as moot Plaintiff's appeal regarding the determination of the maximum compensation rate.

AFFIRMED IN PART AND DISMISSED IN PART.

Judges ELMORE and DIETZ concur.

ANN HARDY PORTER, TRUSTEE OF THE ANN HARDY PORTER LIVING TRUST,
DATED MARCH 9, 2000; JANET S. WILKINS; MARY ANN CASE; VIRGINIA W. HAYES;
SYBEL B. HOFFMAN; KATHLEEN HANDLEY, TRUSTEE OF THE HANDLEY LIVING
TRUST; PHILLIPS CUTRIGHT AND KAREN CUTRIGHT; KARL LEBER AND HEIDI
A. LEBER; PHYLLIS LANGTON, TRUSTEE OF THE DR. PHYLLIS A. LANGTON
REVOCABLE TRUST, DATES MAY 1 2001; PLAINTIFFS,

v.

BEAVERDAM RUN CONDOMINIUM ASSOCIATION, DEFENDANT

No. COA17-793

Filed 1 May 2018

**Associations—condominium association—flood insurance—
flood zone**

A condominium association was obligated by its declaration and the Condominium Act to provide flood insurance for the community's buildings located within a FEMA flood zone each year when such insurance was reasonably available.

Appeal by Plaintiffs from order entered 31 March 2017 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 25 January 2018.

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Adams Hendon Carson Crow & Saenger, P.A., by E. Thomison Holman, for the Plaintiffs.

Cranfill Sumner & Hartzog LLP, by John W. Ong, for the Defendant.

DILLON, Judge.

Plaintiffs are owners of residential condominiums in Beaverdam Run (the “Community”), located in Buncombe County. Plaintiffs brought this action seeking a declaration that the Community’s owners’ association, Beaverdam Run Condominium Association (the “Association”), is required to maintain flood insurance for its buildings located in a flood zone. The trial court entered an order granting summary judgment in favor of the Association and denying Plaintiffs’ request for declaratory judgment. For the following reasons, we reverse and remand for action consistent with this opinion.

I. Background

The Association has a board of directors elected by the owners of units in the Community and is governed by a declaration (the “Declaration”). The Community consists of sixty-six (66) buildings. Five of these buildings are located within a flood zone as designated by the Federal Emergency Management Agency (“FEMA”). Each Plaintiff owns a unit in one of these five buildings.¹

From approximately 2006-2012, the Association maintained flood insurance on each of the five buildings containing Plaintiffs’ units. In 2012, the Association decided not to renew the flood insurance policy, citing concerns regarding cost and the allocation of the expense among the other members of the Association.² The Association notified all owners in the Community of its decision not to renew the flood insurance policy in a detailed letter, in accordance with the terms of the Declaration. The Association declined Plaintiffs’ subsequent requests that the Association resume purchasing and maintaining flood insurance on the five buildings.

In September 2015, Plaintiffs filed a complaint seeking a declaratory judgment from the trial court regarding the Association’s obligation to

1. There are ten individuals who own units in the five buildings. Nine of the ten individuals are plaintiffs in this action. Seven of the ten plaintiffs are parties on appeal.

2. The Association also declined to renew insurance policies protecting against mechanical equipment breakdown, earthquake, and acts of terrorism.

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maintain flood insurance. The Association filed an answer and a motion for summary judgment.

In March 2017, the trial court entered an order granting the Association's motion for summary judgment and dismissing Plaintiffs' complaint with prejudice. Plaintiffs timely appealed.

II. Standard of Review

We review a trial court's grant of summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56.

III. Analysis

Plaintiffs' sole argument on appeal is that the trial court erred in granting the Association's motion for summary judgment, contending that the Association does, in fact, have a duty to maintain flood insurance in Plaintiffs' buildings.

A. The Condominium Act and the Declaration

Resolution of this appeal requires examination of *both* Section 47C-3-113 of the North Carolina Condominium Act (the "Condominium Act") *and* the Declaration.

Section 47C-3-113 of the Condominium Act requires a residential condominium association to maintain insurance "against all risks of direct physical loss commonly insured against," so long as the insurance is "available," specifically providing as follows:

[T]he association shall maintain, *to the extent available*:

(1) Property insurance on the common elements insuring against all risks of direct physical loss *commonly insured against* including fire and extended coverage perils. . . .

N.C. Gen. Stat. § 47C-3-113(a) (emphasis added).³ The statute further provides that "[i]f the insurance described in subsection (a) . . . is not reasonably available, the association promptly shall cause notice of that

3. Subsection (d) mandates that "[i]nsurance policies carried pursuant to subsection (a) must provide that [] [e]ach unit owner is an insured person under the policy with respect to liability arising out of his [or her] interest in the common elements or membership in the association[.]" N.C. Gen. Stat. § 47C-3-113(d).

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fact to be [communicated] . . . to all unit owners. *The declaration may require the association to carry any other insurance*, and the association . . . may carry any other insurance it deems appropriate to protect the association or the unit owners.” N.C. Gen. Stat. § 47C-3-113(c) (emphasis added).

The Declaration contains two sections which govern the Association’s purchase of insurance: Section 8.1 provides generally that the Association is to maintain insurance coverage in accordance with N.C. Gen. Stat. § 47 C-3-113 to the extent that such insurance is “reasonably available,” and Section 8.2 addresses *property* insurance specifically and provides that the Association is to maintain property insurance against “all risks of direct physical loss.” Specifically, these provisions state as follows:

Section 8.1 Coverage. To the extent *reasonably available*, the Board shall obtain and maintain insurance coverage, as a common expense in accordance with Section 47C-3-113 of the Condominium Act and as set forth in this Article. If such insurance is not reasonably available, and the Board determines that any insurance described herein will not be maintained, the Board shall cause notice of that fact to be hand-delivered or sent prepaid by United States mail to all Unit Owners at their respective last known addresses.

Section 8.2 Property and Casualty Insurance. The Association shall procure and maintain property and casualty insurance on the Common Elements and Units insuring against *all risks of direct physical loss*, including fire and extended coverage, for and in an amount equal to the full replacement value of all structures within the Condominium, including all personal property and improvements thereto except for such personal property that is contained in but not attached to the Unit and is owned by the Owner personally.

(Emphasis added). The Declaration also explicitly provides that in the event of a conflict between the terms of the Declaration and the Condominium Act, “the provisions of the [Condominium Act] shall control.”

B. The Association’s Obligation to Maintain Flood Insurance

For the reasons below, we conclude that the Association is obligated by the Declaration and the Condominium Act to maintain insurance against *all risks of direct physical loss* which are *commonly insured*

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against, to the extent that such insurance is *reasonably available*. We further conclude that flood is a risk of direct physical loss which is commonly insured against for residential buildings located in a FEMA-designated flood zone. Accordingly, we conclude that the Association has an obligation to provide flood insurance for the Community's buildings located within the FEMA flood zone each year when such insurance is reasonably available.

1. "Risk of Direct Physical Loss"

We conclude that damage by flood is a "risk of direct physical loss" to property.⁴ Indeed, our Supreme Court has instructed that in the context of insurance policies, "[t]he term 'all risks' is *not* to be given a restrictive meaning." *Avis v. Hartford Fire Ins. Co.*, 283 N.C. 142, 146, 195 S.E.2d 545, 546 (1973) (emphasis added).

The Association essentially argues that (1) the phrase "all risks of direct physical loss" is limited in the Declaration by the phrase which follows, "including fire and extended coverage [perils]" and (2) the risk of flood is *not* a risk of fire or a risk commonly understood as an "extended coverage" peril. The Association relies heavily on an affidavit from the attorney who drafted the Declaration. In the affidavit, the attorney essentially stated that flood is not an "extended coverage peril" and that the peril of flood is not "commonly insured against in property and casualty insurance policies."⁵ However, the question is not whether the risk of flood is commonly insured against only *in property and casualty insurance policies*; rather, the question is whether the phrase "all risks of direct physical loss" is limited to only risks associated with fire and extended coverages.

We conclude that the phrase "all risks of direct physical loss" is not limited by the phrase "including fire and extended coverage [perils]." Had the intent been to limit the Association's obligation to maintain *only* those coverages contained in a standard fire and extended coverages policy, the Community's declarant could have stated as such. Our Supreme Court has consistently noted that the word "including"

4. The standard FEMA flood insurance policy covers a "residential condominium building" for "*direct physical loss* by or from flood to [the] insured property[.]" *Residential Condominium Building Association Policy*, FEMA National Flood Insurance Program, available at https://www.fema.gov/media-library-data/1449522834627-6207ff14ab3d19b2a8d43b3aa6ff6607d/F-144_RCBAP_SFIP_102015.pdf (emphasis added).

5. We note that to the extent the trial court's order relied upon the attorney's legal opinion in concluding that the Association's motion for summary judgment should be granted, that reliance was misplaced. It is the trial court's duty to resolve issues of law.

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indicates an intent to enlarge, not limit, a definition. *See Polaroid Corp. v. Offerman*, 349 N.C. 290, 300-01, 507 S.E.2d 284, 292 (1998), *abrogated on other grounds by Lenox, Inc. v. Tolson*, 353 N.C. 659, 548 S.E.2d 513 (2001); *N.C. Turnpike Auth. v. Pine Island, Inc.*, 265 N.C. 109, 120, 143 S.E.2d 319, 327 (1965) (“The term ‘includes’ is ordinarily a word of enlargement and not of limitation.”); *see also Samantar v. Yousuf*, 560 U.S. 305, 317 (2010) (“[U]se of the word ‘include’ can signal that the list that follows is meant to be illustrative rather than exhaustive.”).

2. “Commonly Insured Against”

We further hold that “flood” is a risk of direct physical loss that is “commonly insured against” for residential buildings located in flood zones. FEMA is responsible for administering the National Flood Insurance Program (“NFIP”), which was created by the United States Congress “in order to make flood insurance available on reasonable terms and conditions to those in need of such protection.” *Guyton v. FM Lending Services, Inc.*, 199 N.C. App. 30, 37, 681 S.E.2d 465, 471 (2009) (internal marks omitted) (citing 42 U.S.C. § 4001). Plaintiffs’ response opposing the Association’s motion for summary judgment included documentation from the NFIP showing that from 2006-2015, the program administered over five million flood insurance policies in each calendar year. At the time of the writing of this opinion, FEMA’s flood policy statistics show that there are approximately 134,126 flood policies in force in the State of North Carolina.⁶ Approximately 1,062 of these policies are in force in Buncombe County, where the Community is located.

FEMA’s Flood Insurance Manual details the methods of insuring residential condominiums. The manual provides that only a condominium’s association may purchase flood insurance coverage on a residential building and its contents – individual unit owners are not eligible to purchase flood insurance through the NFIP. And due to federal lending regulations, owners of properties in special flood hazard areas are required to purchase flood insurance as a condition of receiving a federally backed mortgage. *See* 42 U.S.C. § 4012. In practice,

6. *Policy Statistics Country-Wide*, FEMA National Flood Insurance Program, available at <http://bsa.nfipstat.fema.gov/reports/1011.htm>. We take judicial notice of these statistics pursuant to Rule 201 of the North Carolina Rules of Evidence. N.C. R. Evid. 201 (“A judicially noticed fact must be . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”); *see also State v. Wright*, 290 N.C. 45, 51-52, 224 S.E.2d 624, 628 (1976) (taking judicial notice of statistics on the operation of North Carolina’s superior courts compiled by the Administrative Office of the Courts); *State v. Southern Ry. Co.*, 141 N.C. 46, 54 S.E. 294 (1906) (taking judicial notice of the rules and regulations adopted by the United States Department of Agriculture).

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this means that any time a buyer purchases a property in North Carolina located in a special flood hazard area by way of a mortgage from a federally regulated lender, the property generally must be protected by a flood insurance policy. *See* U.S.C. § 4012(b)(2) (“A Federal agency lender may not make . . . any loan secured by improved real estate . . . in an area that has been identified [] as an area having special flood hazards and in which flood insurance has been made available under the National Flood Insurance Act[.]”). At least one Plaintiff in this action has been unable to sell her unit, despite having an accepted offer to purchase, because the contract was dependent on the buyers obtaining a loan and they were unable to do so because the property was not covered by a flood insurance policy.⁷

3. “Reasonably Available”

Finally, for the following reasons, we hold that the Association’s obligation to maintain flood insurance coverage on the Community’s buildings located in a FEMA flood zone is not absolute for all time. Rather, we hold that the Association only has the obligation so long as flood insurance is “reasonably available.”

The Declaration provides that the Association is required to obtain insurance coverage *only* to the “extent *reasonably available*.”

The Declaration also states that the Association shall obtain insurance coverage “in accordance with Section 47C-3-113 of the Condominium Act[.]” The Condominium Act provides that an association “shall maintain [insurance], *to the extent available*.” N.C. Gen. Stat. § 47C-3-113(a)(1). In interpreting this statutory provision, we are guided by the Official Comment to the statute, included with the printing of the Condominium Act. *See Miller v. First Bank*, 206 N.C. App. 166, 171, 696 S.E.2d 824, 827-28 (2010) (stating that “commentary to a statutory provision can be helpful in some cases in discerning legislative intent[.]” and where comments are “included with the printing of the statute[.] . . . [they are] relevant in construing the intent of the statute”); *see also Crowder Const. Co. v. Kiser*, 134 N.C. App. 190, 206, 517 S.E.2d 178, 189 (1999) (“Consistent with the practice of our Supreme Court, we have given the Commentary ‘substantial weight[.]’”). The Official Comment to N.C. Gen. Stat. § 47C-3-113 clarifies that “[s]ubsections (a) and (b) provide that the required insurance must be maintained *only to the extent*

7. Of course, this requirement might not affect a cash buyer or a mortgage issued by a private mortgage company which is *not* ultimately sold on the secondary market to a federally regulated lender.

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reasonably available. This permits an association to comply with the insurance requirements *even if* certain coverages are unavailable or *unreasonably expensive*.” N.C. Gen. Stat. § 47C-3-113 (official comment).

IV. Conclusion

Flood is a hazard which is commonly insured against for residential properties located in a FEMA flood zone. Whether flood continues to be a hazard “commonly insured against” and whether such insurance is “reasonably available” are to be determined by the Association in the course of its diligent and good-faith execution of its duties. *See* N.C. Gen. Stat. § 47C-3-103 (“In the performance of their duties, the officers and members of the executive board shall be deemed to stand in a fiduciary relationship to the association and the unit owners and shall discharge their duties in good faith, and with that diligence and care which ordinarily prudent [persons] would exercise under similar circumstances in like positions.”). We note that in the event the Association, in any given year, determines in the affirmative to both questions, the Declaration requires that such insurance be maintained *as a common expense*. Indeed, the buildings are owned by all of the unit owners in common.

In the present case, the issue of whether the Association made the proper determination based on the circumstances of the Community in any given year is not before us. Rather, Plaintiffs requested a declaratory judgment to resolve the issue of whether, in general, the Association is obligated to maintain flood insurance on any of its buildings located in a flood plain.

Accordingly, we hold that the trial court erred in granting the Association’s motion for summary judgment. Although there was no genuine issue of material fact, the Association was *not* entitled to judgment in its favor as a matter of law. Therefore, we reverse and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges STROUD and INMAN concur.

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[259 N.C. App. 334 (2018)]

STATE OF NORTH CAROLINA

v.

DAVID WOODARD DANIEL, DEFENDANT

No. COA17-974

Filed 1 May 2018

Motor Vehicles—driving while impaired—probable cause to arrest

An officer had probable cause to arrest defendant for driving while impaired where defendant was speeding, made an abrupt unsafe movement almost resulting in a collision with another vehicle, had alcohol on his breath, had two positive readings on the portable alcohol test, had an open container his car, and admitted to heavy drinking just hours before.

Judge TYSON dissenting.

Appeal by the State from order entered 8 June 2017 by Judge Patrice Hinnant in Wilkes County Superior Court. Heard in the Court of Appeals 20 February 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christopher W. Brooks, for the State.

Vannoy, Colvard, Triplett & Vannoy, PLLC, by Jay Vannoy, for the Defendant-Appellee.

DILLON, Judge.

The State appeals from an order granting Defendant's motion to suppress evidence obtained subsequent to his arrest for driving while impaired. For the reasons stated below, we reverse and remand for further proceedings consistent with this opinion.

I. Background

On the morning of 11 June 2016, a trooper stopped Defendant's vehicle for speeding in Wilkes County. Based on his observations of Defendant, the trooper formed a belief that Defendant had consumed a sufficient quantity of alcohol to impair Defendant's faculties or his ability to safely drive a vehicle. Accordingly, the trooper placed Defendant under arrest for driving while impaired. The trooper also cited Defendant for speeding and for driving with an open container of alcohol.

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Defendant was convicted in district court, but he appealed to superior court for a trial *de novo*. In superior court, Defendant filed a motion to suppress, contending that the trooper lacked probable cause to arrest him. Following a hearing on the matter, the superior court granted Defendant's motion. The State timely appealed.

II. Analysis

On appeal, the State contends that the superior court's findings *do* support a conclusion that the trooper had probable cause to arrest Defendant for driving while impaired.

The State does not challenge any of the superior court's findings of fact; therefore, these findings are binding on appeal. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). Accordingly, our standard of review is whether the superior court's findings support its conclusion that the trooper lacked probable cause to arrest Defendant.

Our Supreme Court has defined "probable cause for an arrest" as:

. . . a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious [person] in believing the accused to be guilty[.]

[T]he evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable [person] acting in good faith.

State v. Bone, 354 N.C. 1, 10, 550 S.E.2d 482, 488 (2001).

Here, for the reasons stated below, we conclude that the findings made by the superior court support a conclusion that the trooper did have probable cause to arrest Defendant.

Specifically, the superior court found as follows: The trooper clocked Defendant traveling at a speed of 80 miles per hour in a 65 mile per hour zone on a multiple-lane highway. As the trooper approached Defendant, Defendant was traveling in the left-hand lane (on the correct side of the road). As the trooper drew close to Defendant, Defendant abruptly moved into the right-hand lane and nearly struck another vehicle before stopping on the shoulder of the highway. During the stop, the trooper noticed a moderate odor of alcohol emanating from Defendant and observed an open 24-ounce container of beer in the cup-holder next to the driver's seat. Defendant told the trooper that he had just purchased the beer, and was drinking it while driving down the highway. Defendant admitted that he had been drinking heavily several hours before the encounter with the trooper. The trooper did not have

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Defendant perform any field sobriety tests; but the trooper did request that Defendant submit to two Alco-sensor tests, both of which yielded positive results for alcohol.

Admittedly, the trial court also made many findings tending to show that Defendant was not driving under the influence of alcohol: He did not have glassy eyes, exhibit slurred speech, or have any issues with balancing or walking. Further, Defendant was cooperative and responsive.

It may be that the superior court's findings are not sufficient to prove Defendant's guilt or to make out a *prima facie* case of Defendant's guilt. But we conclude that the findings are sufficient for a "cautious" police officer to believe that Defendant was driving under the influence. Defendant admitted to drinking, had an open container in his vehicle, had alcohol on his breath, was driving fifteen (15) miles per hour over the speed limit, and made an unsafe movement almost causing an car accident when he pulled across a lane of traffic while pulling over. True, Defendant's unsafe movement across a lane of traffic may have been caused by some factor unrelated to being under the influence of alcohol, such as the nervousness inherent in being pulled over by a police officer. But a "cautious" trooper could also reasonably believe that Defendant's abrupt change of lanes, nearly resulting in a collision, was caused, at least in part, by Defendant being under the influence of alcohol. Swerving alone does not give rise to probable cause, but additional factors creating dangerous circumstances may. *See State v. Wainwright*, 240 N.C. App. 77, 85, 770 S.E.2d 99, 105 (2015).

Therefore, though the findings might not make out a *prima facie* case of Defendant's guilt, the findings were sufficient to justify the trooper, acting cautiously, to arrest Defendant rather than take a chance by allowing Defendant to continue driving in his condition. *See State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971) ("The existence of 'probable cause[]' . . . is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.").

In conclusion, the trial court's findings regarding Defendant's excessive speed, his abrupt unsafe movement almost resulting in a collision with another vehicle, the alcohol on his breath, the two positive readings on the portable alcohol screening test, the open container in his car, and his admission to heavy drinking just hours before – though maybe not enough to clear the "guilty beyond a reasonable doubt" hurdle necessary for a conviction where other findings tend to show that Defendant was sober – does clear the lower "probable cause" hurdle necessary for an

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arrest as established by our Supreme Court. *Bone*, 354 N.C. at 10, 550 S.E.2d at 488.

III. Conclusion

The findings of the superior court support a conclusion that the trooper did have probable cause to arrest Defendant for driving while impaired. Accordingly, we reverse the order of the superior court suppressing evidence obtained as a result of the stop and remand this matter for further proceedings consistent with this opinion.

Judge CALABRIA concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge, dissenting.

The State does not challenge any of the findings of fact contained in the trial court's order. These unchallenged findings of fact support the trial court's conclusion of law that Trooper Berrong did not possess probable cause to arrest Defendant for driving while impaired ("DWI").

The State's appeal challenges only the trial court's conclusion, granting Defendant's motion to suppress the evidence obtained *subsequent to* his arrest for DWI. The majority's opinion concludes probable cause existed to support Defendant's DWI arrest, reverses the trial court's order and remands for further proceedings. I vote to affirm the trial court's order and respectfully dissent.

I. Background

On the morning of 11 June 2016, N.C. Highway Patrol Trooper Joe Berrong was stationary at the Windy Gap exit of Highway 421 in Wilkes County. Trooper Berrong was monitoring traffic coming from Winston-Salem towards Wilkesboro and running stationary radar in order to detect speeding drivers. Trooper Berrong observed a Chevrolet sport utility vehicle coming down the highway and clocked the vehicle's speed at 80 miles per hour in a 65 mile per hour zone.

Trooper Berrong activated his vehicle's lights and siren and pursued the vehicle northbound on Highway 421. As Trooper Berrong approached, the vehicle was traveling in the left-hand lane. When Trooper Berrong drew closer, Defendant abruptly moved out of his way into the right-hand lane and nearly struck another vehicle. Trooper Berrong managed to place his vehicle behind Defendant's vehicle, which had pulled over and stopped on the shoulder of Highway 421.

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Trooper Berrong approached the vehicle and noticed a moderate odor of alcohol emanating from the driver and observed an open 24-ounce container of beer inside the cup holder next to the driver. Defendant was the driver, admitted he had just purchased the beer and was drinking it while driving down the road. Defendant also stated he had also drank heavily the previous night, but had not consumed very much that day.

Trooper Berrong requested Defendant to exit his vehicle. Trooper Berrong stated he still detected a moderate odor of alcohol emanating from Defendant after he exited his vehicle. Trooper Berrong did not ask Defendant to perform any of the standard field sobriety tests, but did request Defendant to submit to two alco-sensor alcohol screening tests. Defendant agreed and both tests yielded positive results for alcohol.

Based upon his observations of Defendant, Defendant's speeding and the manner in which Defendant had operated his vehicle, Trooper Berrong formed an opinion that Defendant had consumed a sufficient quantity of alcohol to impair Defendant's physical or mental faculties or ability to safely operate a vehicle. Defendant was placed under arrest for DWI and issued citations for speeding 80 miles per hour in a 65 mile per hour zone and for driving with an open container of alcohol. Trooper Berrong transported Defendant to the local courthouse where Defendant was administered an intoximeter test.

On 23 February 2017, Defendant pled guilty to all charges in Wilkes County District Court. The district court sentenced Defendant to 60 days imprisonment and suspended the sentence to twelve months of unsupervised probation. Defendant then entered notice of appeal to superior court for a trial *de novo*.

On 29 March 2017, Defendant filed a pre-trial motion to suppress evidence and asserted lack of probable cause for his arrest. Following a hearing on the motion, the superior court entered an order allowing Defendant's motion to suppress. The State filed timely notice of appeal to this Court.

II. Standard of Review

"The standard of review for a motion to suppress is whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law." *State v. Wainwright*, 240 N.C. App. 77, 83, 770 S.E.2d 99, 104 (2015) (internal quotation marks and citation omitted). "[I]n evaluating a trial court's ruling on a motion to suppress . . . the trial court's findings of fact are conclusive on appeal

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if supported by competent evidence, even if the evidence is conflicting.” *State v. Allen*, 197 N.C. App. 208, 210, 676 S.E.2d 519, 521 (2009) (citation omitted). Findings of fact not challenged on appeal are deemed supported by competent evidence and are binding upon this Court. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted). “The trial court’s conclusions of law . . . are fully reviewable on appeal.” *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

III. Analysis

The State does not challenge any of the trial court’s findings of fact in the order granting Defendant’s motion to suppress. These findings are based upon competent evidence and are binding upon appeal. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878.

With regard to the trial court’s conclusions of law, the State argues that the trial court erred in granting Defendant’s motion to suppress. It asserts the totality of the circumstances indicate Trooper Berrong had probable cause to arrest Defendant for DWI. Whether Trooper Berrong lacked probable cause to arrest Defendant for DWI and whether the trial court properly granted Defendant’s motion to suppress must be reviewed in light of the trial court’s unchallenged findings of fact.

A. Probable Cause

“Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.” *State v. Teate*, 180 N.C. App. 601, 606-07, 638 S.E.2d 29, 33 (2006) (quoting *Illinois v. Gates*, 462 U.S. 213, 244 n. 13, 76 L. Ed. 2d 527, 552 n. 13 (1983)). “Probable cause exists if the facts and circumstances at that moment [that are] within the charging officer’s knowledge[,] and of which the officer had reasonably trustworthy information[,] are such that a prudent man would believe that the suspect had committed or was committing an offense.” *Moore v. Hodges*, 116 N.C. App. 727, 730, 449 S.E.2d 218, 220 (1994) (citation omitted).

“Whether probable cause exists to justify an arrest depends on the ‘totality of the circumstances’ present in each case.” *State v. Sanders*, 327 N.C. 319, 339, 395 S.E.2d 412, 425 (1990) (citations omitted), *cert. denied*, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991).

B. Unchallenged Findings of Fact

Here, the trial court made the following unchallenged findings of fact:

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1. On June 11, 2016, at approximately 9:30 a.m., Trooper Joe Berrong with the N.C. Highway Patrol was sitting stationary on the Windy Gap exit of Highway 421 in Wilkes County, North Carolina, watching traffic on Highway 421 for speeding and was running stationary radar. At this time, Trooper Berrong had worked for the Highway Patrol for approximately 14 years and had worked as a law enforcement officer for 19 years with at least 100 arrests for driving while impaired.
2. Trooper Berrong clocked the Defendant traveling at an estimated 80 mph in a 65 mph zone on Highway 421. The Trooper activated his lights and siren and pursued the Defendant.
3. When Trooper Berrong caught up to the Defendant, the Defendant was driving in the left lane. Trooper Berrong pulled up behind the Defendant with lights and sirens activated, then the Defendant made a sharp cut into the right-hand lane and cut off another vehicle nearly striking the other vehicle. Trooper Berrong followed the Defendant into the right hand lane and then the Defendant pulled off onto the shoulder at or near the next exit off of Highway 421 towards the rest area where he stopped.
4. Less than one minute passed from the time that Trooper Berrong started pursuit of the Defendant until the Defendant stopped.
5. Trooper Berrong was alerted to the Defendant's vehicle based on his speed.
6. Other than [sic] the Defendant's speed and his sharp turn into the right hand lane nearly striking another vehicle, Trooper Berrong did not notice anything else unusual or illegal about the Defendant's operation of his vehicle. It was described as 'a straight up speeding stop'.
7. When Trooper Berrong approached the Defendant's car, he noticed a moderate odor of alcohol coming from the Defendant's breath and an open container of alcohol, an Ice House beer, in the Defendant's car. The Defendant was the sole occupant of the vehicle.
8. The Defendant told Trooper Berrong that he drank heavily the night before and that he had not drunk much

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of the open container of alcohol, but what he had drank of the open container he drank while coming up the road.

9. Trooper Berrong was unable to recall what was done with the container, the temperature of the container or how much was in it. It was unknown when the Defendant bought the beer other than sometime that morning or how long the Defendant had been on the road. Defendant was on the way to Boone to work on his house.

10. Trooper Berrong requested the Defendant to get out of the vehicle and the Defendant complied with that request. They walked back to Trooper Berrong's patrol car and the Defendant sat in the patrol car with Trooper Berrong. Trooper Berrong observed there was nothing unusual about the Defendant's gait. In the patrol car, Trooper Berrong still noticed a moderate odor of alcohol coming from the Defendant's person.

11. On June 11, 2016, Trooper Berrong was certified to use the intoximeter FST alcohol screening device which was assigned to him by the Highway Patrol. This alcohol screening device had been calibrated and was working properly.

12. Trooper Berrong asked the Defendant to submit to an alcohol screening test and the Defendant complied. Trooper Berrong administered the first test at 9:36 a.m. and the second test at 9:42 a.m. and both tests yielded a positive result. The Trooper's notes did not include the FST to determine alcohol.

13. Trooper Berrong did not other present [sic] evidence of performance on standardized field sobriety tests. Trooper Berrong felt that the location of the vehicle stop was not practical to administer field sobriety tests. Specifically, the shoulder was uneven, very rough, and only partially paved. The Defendant stopped between the Windy Gap Road exit (exit 277) and the NC-115 exit (exit 282). A rest area was located approximately one mile past the NC-115 exit.

14. Trooper Berrong formed an opinion that the Defendant had consumed a sufficient amount of alcohol to impair the Defendant's physical and/or mental faculties.

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15. The Defendant was arrested for driving while impaired. Trooper Berrong issued a citation to the Defendant for speeding 80 mph in a 65 mph zone and for driving with an open container of alcoholic beverage after drinking.

16. During the entire time that Trooper Berrong was interacting with the Defendant, the Defendant was polite, cooperative, and respectful to the Trooper.

17. Trooper Berrong observed the Defendant try to cover up the open container of alcohol before the Defendant got out of his car, but this did not affect Trooper Berrong's opinion that the Defendant was being very cooperative.

18. The Defendant did not have red glassy eyes or any slurred speech. Trooper Berrong was able to communicate with the Defendant clearly.

19. Trooper Berrong did not notice anything unusual about the Defendant's ability to walk, stand or maintain his balance.

C. The State's Argument

The State asserts Trooper Berrong had probable cause to arrest Defendant because he had sufficient knowledge to believe Defendant had committed or was committing the offense of DWI. The State argues, and the majority's opinion agrees, the totality of the circumstances supports a conclusion that Trooper Berrong had probable cause to arrest Defendant for DWI because:

- (1) he clocked Defendant traveling 15 miles over the posted speed limit;
- (2) Defendant almost struck another vehicle when attempting to pull over;
- (3) Defendant had a moderate odor of alcohol emanating from his person;
- (4) Defendant admitted to drinking heavily the night before;
- (5) Defendant had an open container of alcohol in his vehicle that he attempted to cover up;
- (6) Defendant admitted to recently drinking said alcohol while driving down the road; and
- (7) Defendant registered two (2) positive readings on the portable alcohol screening test.

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The State's argument relies in part on the case of *State v. Townsend*, 236 N.C. App. 456, 762 S.E.2d 898 (2014), to support its assertion that Trooper Berrong had probable cause to arrest Defendant for DWI. In *Townsend*, the defendant was stopped at a police checkpoint where a law enforcement officer had noticed the defendant had red, bloodshot eyes, emitted a strong odor of alcohol, and admitted to drinking several beers earlier in the evening. *Id.* at 458, 762 S.E.2d at 901. The officer administered two alco-sensor tests, which were positive for alcohol. *Id.* The officer also had the defendant perform several field sobriety tests, including a horizontal gaze nystagmus test, a "walk and turn" test, and a "one leg" stand test. *Id.* The defendant exhibited multiple signs of intoxication on each of those tests. *Id.* The defendant was arrested and later convicted of DWI. *Id.*

The defendant had filed a motion to suppress for lack of probable cause, which was denied by the trial court. *Id.* at 464, 762 S.E.2d at 904. On appeal, the defendant argued that because he did not exhibit signs of intoxication such as slurred speech, glassy eyes, or physical instability, there was insufficient probable cause for his arrest. *Id.* at 465, 762 S.E.2d at 905. This Court concluded there was probable cause because "[the officer] noted that defendant had bloodshot eyes, emitted an odor of alcohol, exhibited clues as to intoxication on three field sobriety tests, and gave positive results on two alco-sensor tests." *Id.*

The facts here are distinguishable from those in *Townsend*. The defendant in *Townsend* exhibited several signs of intoxication, in addition to the two positive alco-sensor results, odor of alcohol, and admission of consuming alcohol prior to driving. These additional signs included bloodshot eyes and indications of intoxication from the three administered standard field sobriety tests. *Id.* at 458, 762 S.E.2d at 901. In the instant case, although Defendant admitted to consuming alcohol, had an open container of beer in his vehicle, and emanated a moderate odor of alcohol, these were the only indications tending to show he could be impaired or intoxicated.

While Defendant's speeding and abrupt change of lanes may support probable cause to support the citation for speeding, these actions and the other observations of Trooper Berrong, do not support probable cause that Defendant's mental or physical faculties were "appreciably impaired" or that he had a "[blood] alcohol concentration of 0.08 or more." *State v. McDonald*, 151 N.C. App. 236, 244, 565 S.E.2d 273, 277 (2002); see also N.C. Gen. Stat. § 20-138.1(a) (2017).

According to the trial court's unchallenged and binding findings of fact in the order granting Defendant's motion to suppress, Trooper

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Berrong initiated the stop solely based upon Defendant's speeding. Trooper Berrong did not observe anything unusual about Defendant's driving in addition to speeding, except his abrupt merging into the right-hand lane to pull over. Neither Defendant's speed nor his abrupt move into the right-hand lane in response to Trooper Berrong driving up behind him with activated lights and sirens tend to show probable cause that Defendant was driving while impaired.

Significantly, Trooper Berrong did not observe anything that would indicate probable cause of appreciable impairment or a .08 blood alcohol concentration or greater intoxication in Defendant's gait, manner of speaking or appearance. Additionally, Defendant acted politely, cooperatively, responsively and respectfully during their interaction. Also, and unlike the defendant in *Townsend*, Defendant was not asked to perform any standard field sobriety tests and did not have bloodshot eyes. *See id.*

As the fact finder, the trial court had the opportunity to observe all witnesses and their demeanor. The trial court's unchallenged findings of fact are based upon the competent evidence in the record. These findings support its conclusion that the totality of the circumstances did not provide probable cause for Trooper Berrong to arrest Defendant for DWI. *See Sanders*, 327 N.C. at 339, 395 S.E.2d at 425. The order of the trial court should be affirmed.

IV. Conclusion

Under the totality of the circumstances and the unchallenged findings of fact, the trial court properly concluded that Trooper Berrong lacked sufficient probable cause to arrest Defendant for DWI. The trial court's unchallenged and binding findings of fact support its conclusions of law.

The State failed to show Trooper Berrong possessed probable cause to support Defendant's arrest for DWI or carry its burden to overcome the presumption of correctness of the trial court's order on appeal. The order of the trial court granting Defendant's motion to suppress is properly affirmed. For these reasons, I respectfully dissent.

STATE v. ELDRED

[259 N.C. App. 345 (2018)]

STATE OF NORTH CAROLINA

v.

PAUL DAVID ELDRED, DEFENDANT

No. COA17-795

Filed 1 May 2018

**Motor Vehicles—driving while impaired—sufficiency of evidence
—gaps in evidence**

The evidence was insufficient to establish that defendant was driving while impaired where he was found walking along the highway several miles from his wrecked car, admittedly “smoked up on meth,” but no evidence was presented that defendant was impaired *while* he was operating his vehicle.

Appeal by Defendant from judgment entered 30 March 2017 by Judge Gary M. Gavenus in Avery County Superior Court. Heard in the Court of Appeals 25 January 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christina S. Hayes, for the State.

Cooley Law Office, by Craig M. Cooley, for Defendant-Appellant.

INMAN, Judge.

One hundred feet of tire impressions veer off a highway, past a scuffed boulder, and end at a damaged, unoccupied vehicle whose registered owner is found walking along the same highway disoriented and unsteady on his feet. He admits that he is “smoked up on meth” and that he wrecked the vehicle “a couple of hours” earlier. Most anyone would surmise what happened, and might very well be right. But because the law prohibits imposing criminal liability based on conjecture, gaps in the evidence and controlling precedent require that we reverse Defendant’s conviction for driving while impaired.

Paul Eldred (“Defendant”) appeals from a judgment following a jury verdict finding him guilty of driving while impaired (“DWI”). Defendant argues that the trial court erred in denying his motion to dismiss because the State failed to present evidence that his admitted impairment began before or during the time he was operating his vehicle. After careful review, we agree.

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Factual and Procedural History

The State's evidence at trial tended to show the following:

On 30 October 2015, between 8:20 and 8:30 p.m., law enforcement officers in Avery County received a radio communication of a reported motor vehicle accident on Highway 221 north of the intersection with Highway 105. Avery County Sheriff's Deputy Timothy Clawson ("Deputy Clawson") and State Highway Patrol Trooper J.D. Boone ("Trooper Boone") found a Jeep Cherokee stopped on the right shoulder of the highway. The vehicle was facing north, in the same direction as the right lane of travel, toward Grandfather Mountain. The vehicle's right side panel was damaged. Officers observed approximately 100 feet of tire impressions on the grass leading from the highway to the stopped vehicle. The first ten feet of the impressions led from the highway to a large rock embankment that appeared scuffed. Beyond the embankment, the impressions continued to where the vehicle was stopped. No one was in the vehicle or at the scene.

Deputy Clawson searched for information based on the vehicle's license plate and learned that the registered owner was Defendant. He then left the accident scene and drove on Highway 221 looking for the missing driver. Two or three miles north of the accident scene, he saw a man walking on the left side of Highway 221 and stopped to question the man, later identified as Defendant. Deputy Clawson noticed a mark on Defendant's forehead and observed that he was twitching and seemed unsteady on his feet. Asked his name, Defendant replied, "Paul." Asked what he was doing walking along the highway, Defendant replied, "I don't know, I'm too smoked up on meth." Deputy Clawson handcuffed Defendant for safety purposes and asked if he was in pain. Defendant said that he was, and Deputy Clawson called for medical help.

Deputy Clawson did not ask Defendant how he came to be in pain. Deputy Clawson did not ask Defendant about his admitted illegal activity or attempt to determine whether Defendant was impaired by a substance or as a result of the accident. Deputy Clawson instead focused on Defendant's medical wellbeing. When emergency medical personnel arrived, Deputy Clawson removed the handcuffs and allowed Defendant to leave in an ambulance.

Trooper Boone traveled from the accident scene to Cannon Hospital, where he learned Defendant had been taken by ambulance. He found Defendant in a hospital room at approximately 9:55 p.m. and explained he was investigating the reported accident. Answering Trooper Boone's questions, Defendant confirmed that he had been driving his vehicle and

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said it had run out of gas. Defendant then said that “he was hurt bad and was involved in a wreck a couple of hours ago.” Asked if he had been drinking alcohol, Defendant said no. Asked if he had taken any medications, Defendant “said he was on meth.” Trooper Boone did not ask Defendant or medical personnel whether Defendant had been given any pain medication in the ambulance or in the hospital.

Trooper Boone observed that Defendant was twitching, appeared dazed, took several seconds to form words in response to questions, and shouted his answers to questions. Defendant said he was “messed up” and unable to perform any sobriety tests. Defendant did not know the date, the day of the week, or the time. Trooper Boone formed the opinion that Defendant had consumed a sufficient amount of an impairing substance to appreciably impair his mental and physical faculties. Trooper Boone then informed Defendant that he would be charged with driving while impaired and advised Defendant of his Miranda rights. After Defendant confirmed that he understood his rights, Trooper Boone asked further questions. Defendant again said that he had run out of gas while driving from Banner Elk. Defendant said he “was just driving” and did not have a destination. Defendant did not recall which highway he had been on or what city he was in. Trooper Boone did not ask Defendant when he had last consumed meth, when he became impaired, whether he had consumed meth prior to or while driving, or what Defendant did between the time of the accident and the time Deputy Clawson found him walking beside the highway.

Following an order by the trial court granting Defendant’s motion to suppress, the State presented no evidence of any laboratory test reflecting the presence or concentration, if any, of any impairing substance in Defendant’s blood or urine.

Analysis

This appeal requires us to examine the boundary between evidence supporting suspicion and conjecture, which is insufficient to submit a criminal charge to a jury, and, on the other hand, evidence allowing a reasonable inference of fact, which is sufficient to support a criminal conviction.

Defendant argues that the State failed to present substantial evidence of an essential element of DWI—that Defendant was impaired *while* he was driving.

This Court reviews a trial court’s order denying a defendant’s motion to dismiss *de novo*. *State v. McKinnon*, 306 N.C. 288, 289, 293 S.E.2d 118,

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125 (1982). “When ruling on a defendant’s motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

“Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

Driving while impaired is a statutory offense in North Carolina. N.C. Gen. Stat. § 20-138.1(a) (2015) provides in pertinent part that “[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . while under the influence of an impairing substance” The essential elements of DWI are therefore: “(1) Defendant was driving a vehicle; (2) upon any highway, any street, or any public vehicular area within this State; (3) while under the influence of an impairing substance.” *State v. Mark*, 154 N.C. App. 341, 345, 571 S.E.2d 867, 870 (2002), *aff’d*, 357 N.C. 242, 580 S.E.2d 693 (2003) (per curium) (citing N.C. Gen. Stat. § 20-138.1).

Defendant compares the evidence in this case to that in *State v. Hough*, 229 N.C. 532, 50 S.E.2d 496 (1948), in which the North Carolina Supreme Court held the evidence was insufficient to raise more than a suspicion or conjecture of impairment. In that case, two officers arrived at the scene of an accident approximately 30 minutes after it was reported. *Id.* at 533, 50 S.E.2d at 497. One officer testified his opinion of the defendant’s intoxication was based on the fact that he smelled something on the defendant’s breath. *Id.* at 533, 50 S.E.2d at 497. The other officer testified that it was his opinion the defendant was intoxicated or under the influence of something. *Id.* at 533, 50 S.E.2d at 497. But neither officer could testify with certainty whether the defendant’s condition was the result of intoxication or the result of the injuries he sustained in the accident. *Id.* at 533, 50 S.E.2d at 497. The Court, reversing the trial court’s denial of the defendant’s motion for judgment as of nonsuit, reasoned that “[i]f the witnesses who observed the defendant immediately after his accident, were unable to tell whether or not he was under the influence of an intoxicant or whether his condition was the result of

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the injuries he had just sustained, we do not see how the jury could do so.” *Id.* at 533, 50 S.E.2d at 497.

The State likens the evidence of this case with the facts of *State v. Collins*, 247 N.C. 244, 248 100 S.E.2d 489, 491 (1957), in which the North Carolina Supreme Court distinguished *Hough* and upheld a conviction for impaired driving. The defendant in *Collins* was thrown from his automobile after crossing the center lane and striking another vehicle. *Id.* at 246, 100 S.E.2d at 490. The driver of the second vehicle approached the defendant and asked if he could take the defendant to the doctor. *Id.* at 246, 100 S.E.2d at 490. The defendant was holding his head as if hurt, but when the second driver asked if he could take the defendant to a doctor, the defendant said no. *Id.* at 246, 100 S.E.2d at 490. The defendant then left the scene. *Id.* at 246, 100 S.E.2d at 490. The defendant returned to the scene approximately 45 minutes later and officers observed that he had a strong odor of alcohol on his breath, had urinated his pants, his speech was incoherent, and he was unable to stand without assistance. *Id.* at 246, 100 S.E.2d at 490. Officers noticed no cuts, bruises, or abrasions on the defendant’s head, and the defendant said he was not hurt. *Id.* at 246, 100 S.E.2d at 490. The Court, considering the evidence in the light most favorable to the State, concluded that “the evidence of defendant’s intoxication was not too remote in point of time, or too speculative, to permit a legitimate inference that the defendant was under the influence of intoxicating liquor at the time of the collision” *Id.* at 248, 100 S.E.2d at 491.

The record here contrasts sharply with the facts in *Collins*. The State presented no evidence of when Deputy Clawson encountered Defendant. Trooper Boone did not encounter Defendant until approximately 9:55 p.m., more than 90 minutes after the accident was reported. Defendant told Trooper Boone that he had been in a wreck “a couple of hours ago.” That is more than twice as long as the delay which *Collins* held was “not too remote in point of time” between when a witness saw the defendant exiting his vehicle and law enforcement officers encountered him. Further, unlike in *Collins*, the State presented no evidence of how much time elapsed between the vehicle stopping on the shoulder and the report of an accident being made. Also, unlike in *Collins*, the State presented no testimony by any witness who observed Defendant driving the vehicle at the time of the accident or immediately before the accident.

Evidence of Defendant’s physical condition also distinguishes this case from *Collins*. In *Collins*, the defendant denied being hurt and declined medical treatment. Here, by contrast, both Deputy Clawson

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and Trooper Boone observed an injury on Defendant's head, emergency medical personnel transported Defendant to a hospital, and Defendant said he was "hurt bad."

The limited evidence in this case is more similar to *Hough* than to *Collins*. Deputy Clawson, who first found Defendant after he had walked two or three miles beyond his vehicle, did not determine whether Defendant's condition was caused by an impairing substance or by the injury that resulted in emergency medical personnel taking Defendant to the hospital. Trooper Boone, who interviewed Defendant in the hospital, did not obtain information concerning when or where Defendant had consumed meth or any other impairing substance. Neither officer even knew when Defendant's vehicle had veered off the highway.

The gaps in evidence in this case are also analogous to those in *State v. Ray*, 54 N.C. App. 473, 283 S.E.2d 823 (1981). In *Ray*, a law enforcement officer found the defendant, who was intoxicated, alone in a disabled vehicle, "halfway [in] the front seat." *Id.* at 474-75, 283 S.E.2d at 825. This Court held that the trial court erred in denying the defendant's motion to dismiss a driving while impaired charge because "[the] circumstantial evidence alone is insufficient to support a conclusion that the defendant was the driver." *Id.* at 475, 283 S.E.2d at 825. This Court noted that the State presented no evidence that the car "had been operated recently or that it was in motion at the time the officer observed the defendant . . . [n]or did the State offer evidence that the motor was running with the defendant sitting under the steering wheel at the time the officer came upon the scene" *Id.* at 475, 283 S.E.2d at 825.

Here, unlike in *Ray*, the State presented evidence that Defendant owned the vehicle, and Defendant admitted that he had been driving his vehicle and wrecked it "a couple of hours" earlier. But Defendant did not admit that he had been "smoked up on meth" or otherwise impaired when he was driving the vehicle. And the State presented no evidence, direct or circumstantial, to establish that essential element of the crime of driving while impaired.

"When the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt, they are insufficient to make out a case and a motion to dismiss should be allowed." *State v. Blizzard*, 280 N.C. 11, 16, 184 S.E.2d 851, 854 (1971). We are bound to follow our precedent.

Conclusion

Because the State presented insufficient evidence to establish that Defendant was impaired while driving, we hold that the trial

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court erred in denying Defendant's motion to dismiss and reverse Defendant's conviction.

REVERSED.

Judges STROUD and DILLON concur.

STATE OF NORTH CAROLINA
v.
PAUL ARNOLD GRAY, DEFENDANT

No. COA17-508

Filed 1 May 2018

Evidence—expert opinion testimony—reliability—chemical drug analysis

The trial court did not commit plain error by admitting an expert's opinion that rocks found in defendant's possession contained cocaine where the expert laid a proper foundation under N.C.G.S. § 8C-1, Rule 702 regarding the chemical analysis process used.

Appeal by Defendant from judgment entered 13 December 2016 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Lauren Tally Earnhardt, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

MURPHY, Judge.

In a criminal prosecution for possession of a controlled substance, when an expert in forensic chemistry provides testimony that establishes a proper foundation under Rule 702(a) of the Rules of Evidence, the expert's opinion is otherwise admissible, and any unpreserved assignments of error related to the trial court's "gatekeeping" function is only reviewed for plain error. Furthermore, when plain error is assigned to a trial court's admission of expert testimony on the grounds that the testimony is not "reliable," we do not consider data or theories advanced

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in a defendant's appellate brief which were neither before the trial court when the expert opinion was admitted nor made part of the record on appeal.

Paul Arnold Gray ("Defendant") appeals his 13 December 2016 conviction for felony possession of cocaine in violation of N.C.G.S. § 90-95(d)(2). On appeal, he argues that the trial court committed plain error by admitting the expert opinion of a forensic chemist because her testimony failed to demonstrate that the methods she used were "reliable" under the current version of Rule 702. Defendant specifically maintains that the particular testing process used by the Charlotte-Mecklenburg Police Department Crime Lab ("CMPD Crime Lab") to identify cocaine creates an unacceptable risk of a false positive, and, this risk, standing alone, renders expert testimony based on the results of this testing process inherently unreliable under Rule 702(a). We do not consider this theory as it goes beyond the record and conclude that Defendant received a trial free from error.

BACKGROUND

On 30 August 2014, Defendant was arrested for possession of a stolen motor vehicle. After placing Defendant under arrest, Sergeant Rollin Mackel ("Sergeant Mackel") searched Defendant, and found two small "rocks" in Defendant's pants pocket. Sergeant Mackel believed the "rocks" were crack cocaine, so he seized them and placed them in an evidence envelope for storage and later testing. Lillian Ngong ("Ngong"), a forensic chemist with the CMPD Crime Lab, performed a chemical analysis on the substance in the envelope. Defendant was indicted for felony possession of cocaine in violation of N.C.G.S. § 90-95.

At trial, the State tendered Ngong as an expert in the field of forensic chemistry without objection. During direct examination, Ngong testified that she was employed by the CMPD Crime Lab and that she was the analyst who tested the substance in the evidence envelope. Ngong then described the methods the CMPD Crime Lab uses to identify controlled substances:

- First, the substance is weighed.
- Then, a presumptive test is performed by dropping an indicator chemical on a sample of the substance and observing if the sample changes color. For a presumptive test for cocaine, if the sample turns blue, the analyst performs additional testing on the substance with a gas chromatography mass

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spectrometer (“GCMS”) to confirm the result of the presumptive test.

- Next, to ensure that the GCMS is in working condition, analysts first run a chemical solvent that does not contain any prohibited substances through the instrument. This is called a “blank.”
- After running the “blank” through the GCMS, the subject substance, which is believed to contain a controlled substance (such as cocaine or heroin), is tested with the GCMS.
- Finally, CMPD Crime Lab analysts evaluate the results of the test and determine whether or not the substance tested is a controlled substance.¹

After explaining the CMPD Crime Lab’s drug identification methods without objection, Ngong testified to how she tested and identified the substance seized from Defendant. She weighed the substance and conducted the presumptive test for cocaine. She then analyzed the substance seized from Defendant in the GCMS. Ngong also testified that the GCMS was working properly the day she analyzed the substance. Based on her analysis, Ngong testified that it was her opinion that the substance she tested contained cocaine, and Defendant did not object to her expert opinion.

On cross and re-direct examinations, Ngong testified about another step of testing utilized by the CMPD Crime Lab. Specifically, after testing the sample, the lab analysts test a “standard,” which is a substance known to contain cocaine (or another relevant drug) in the GCMS. Ngong testified that “before we put out any conclusion” the results of the sample test are compared to the test results of the known standard. She also testified that she tested a “standard” that was cocaine after testing the “sample” (the substance seized from Defendant) and that this was standard practice in forensic chemistry.

1. Ngong provided testimony that demonstrated how CMPD Crime Lab analysts identify specific drugs using the GCMS. Generally speaking, each drug has a unique molecular signature, like a fingerprint, that is revealed during testing. Ngong testified that “[w]hen it gets to the end of the gas chromatography it is introduced into the mass [spectrometer] . . . It breaks down into ions . . . And each ion is unique to the drug. It’s like a fingerprint. Cocaine will break up in a different way. Marijuana or THC . . . will break up in a different way . . . Heroin will break up in a different way. That’s how we identify.”

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Ngong's opinion testimony was the only evidence that established that the substance seized from Defendant contained a controlled substance. On appeal, Defendant contends that Ngong's expert testimony was unreliable, and therefore inadmissible under Rule 702(a). However, Defendant did not object to Ngong's testimony during trial on these grounds and now requests that this court review this issue for plain error. On appeal, Defendant argues that the CMPD Crime Lab's GCMS process is flawed because it requires an analyst to test the "sample" (which is believed to contain cocaine) and then test a "standard" (which is known to contain cocaine) without running another blank to clean out the GCMS and remove any residue possibly left by the "sample."² According to Defendant, by not running another blank before testing the standard, the CMPD Crime Lab's drug identification process creates an unacceptable risk of a false positive, and renders Ngong's methods inherently unreliable under Rule 702(a).

STANDARD OF REVIEW

Defendant's issue on appeal is that the trial court erred in admitting Ngong's expert opinion testimony because her "testimony showed that scientific principles and methods were not reliably applied" as required by Rule 702(a). Since Defendant failed to object to Ngong's testimony during trial, this issue is unpreserved. *See* N.C. R. App. P. 10(a)(1). However, we recently held that an unpreserved challenge to the performance of a trial court's gatekeeping function under Rule 702 in a criminal trial is subject to plain error review. *State v. Hunt*, ___ N.C. App. ___, ___, 792 S.E.2d 552, 559 (2016). We review the admission of Ngong's expert opinion testimony for plain error.

To establish plain error, a defendant must show that the error "was a fundamental error—that the error had a probable impact on the jury verdict." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal citations, quotation marks, and alterations omitted).

ADMISSIBILITY OF EXPERT TESTIMONY UNDER RULE 702

"Whether expert witness testimony is admissible under Rule 702(a) is a preliminary question that a trial judge decides pursuant to Rule

2. However, CMPD Crime Lab analysts do run a blank before testing the sample to make sure the GCMS is in working condition.

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104(a).” *State v. McGrady*, 368 N.C. 880, 892, 787 S.E.2d 1, 10 (2016). In 2011, the General Assembly amended Rule 702 of the Rules of Evidence and adopted the Federal *Daubert* standard, which gives trial court judges a “gatekeeping” role when admitting expert opinion testimony. *See id.* at 885-89, 787 S.E.2d at 8-11. However, the 2011 amendment did not categorically overrule all judicial precedents interpreting Rule 702, and “[o]ur previous cases are still good law if they do not conflict with the *Daubert* standard.” *Id.* at 888, 787 S.E.2d at 8. Rule 702 does not “mandate particular procedural requirements,” *id.* at 893, 787 S.E.2d at 11, and its gatekeeping obligation was “not intended to serve as a replacement for the adversary system.” *Hunt*, ___ N.C. App. at ___, 792 S.E.2d at 559. Rather, “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof” continue as the “traditional and appropriate means of attacking shaky but admissible evidence.” *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 461, 597 S.E.2d 674, 688 (2004) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596, 113 S. Ct. 2786, 2798 (1993)).

Additionally, since the 2011 amendment became effective, we have observed that:

[w]e can envision few, if any, cases in which an appellate court would venture to superimpose a *Daubert* ruling on a cold, poorly developed record when neither the parties nor the . . . court has had a meaningful opportunity to mull the question.

Hunt, ___ N.C. App. at ___, 792 S.E.2d at 560 (internal citations and quotation marks omitted). Our jurisprudence wisely warns against imposing a *Daubert* ruling on a cold record, and we limit our plain error review of the trial court’s gatekeeping function to the evidence and “material included in the record on appeal and the verbatim transcript of proceedings[.]” *See State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524-25 (2001) (quotations omitted) (“on direct appeal, the reviewing court ordinarily limits its review to material included in the record on appeal and the verbatim transcript of proceedings, if one is designated.”); *see also* N.C. R. App. P. 9(a) (“ . . . review is solely upon the record on appeal[.]”).

The burden of satisfying Rule 702(a) rests on the proponent of the evidence, and the testimony must satisfy three general requirements to be admissible. *See McGrady*, 368 N.C. at 889, 787 S.E.2d at 8 (citing N.C. R. Evid. 702(a)). “[T]he area of proposed testimony must be based on scientific, technical or other specialized knowledge that will assist the

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trier of fact to understand the evidence or to determine a fact in issue.” *Id.* at 889, 787 S.E.2d at 6 (internal quotations omitted). The witness must also be “qualified as an expert by knowledge, skill, experience, training, or education.” *Id.* “Third, the testimony must meet the three-pronged reliability test . . . : ‘(1) The testimony [must be] based upon sufficient facts or data. (2) The testimony [must be] the product of reliable principles and methods. (3) The witness [must have] applied the principles and methods reliably to the facts of the case.’ ” *Id.* at 890, 787 S.E.2d at 9 (citing N.C. R. Evid. 702(a)(1)–(3)). “The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony [and] . . . the trial court has discretion in determining how to address the three prongs of the reliability test.” *Id.*

ANALYSIS

Defendant argues that the process used by Ngong and the CMPD Crime Lab to identify drugs using a GCMS is unreliable under Rule 702(a) because it creates an unacceptable risk of a false positive. However, this specific argument is based on documents, data, and theories that were neither presented to the trial court nor included in the record on appeal. They are only raised in Defendant’s brief.³ Therefore, our plain error review of Defendant’s Rule 702 argument is limited solely to the record on appeal and the question of whether or not an adequate foundation was laid before Ngong’s expert opinion was admitted.

After careful review, we conclude that a proper Rule 702(a) foundation was established at the time Ngong provided her opinion because her testimony demonstrated that she was a qualified expert and that her opinion was the product of reliable principles and methods which she reliably applied to the facts of the case. Ngong was tendered as an expert in the field of forensic chemistry and testified that she had a degree in Chemistry with over 20 years of experience in the field of drug identification. She also testified about the type of testing conducted on the substance seized from Defendant and the methods used by the CMPD Crime Lab to identify controlled substances. Ngong then testified that she was the analyst who tested the substance seized from Defendant, that she used a properly functioning GCMS, and that the results from that test provided the basis for her opinion. Furthermore, her testimony indicates that she complied with CMPD Crime Lab procedures and the methods she used were “standard practice in forensic chemistry.” Ngong’s

3. For example, Defendant’s brief claims that “after considerable legal research” he has concluded that no other crime lab uses the exact process for testing substances in a GCMS.

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testimony demonstrated that she was an experienced forensic chemist who competently performed a chemical analysis using a properly functioning GCMS to determine if the two “rocks” seized from Defendant contained cocaine. This testimony was sufficient to establish a foundation for admitting her expert opinion testimony under Rule 702.

Defendant also maintains that the trial court erred “by failing to conduct any further inquiry” when Ngong’s testimony showed Ngong used scientifically unreliable methods. We disagree. While in some instances a trial court’s gatekeeping obligation may require the judge to question an expert witness to ensure his or her testimony is reliable, *sua sponte* judicial inquiry is not a prerequisite to the admission of expert opinion testimony. *See McGrady*, 368 N.C. at 893, 787 S.E.2d at 11 (“[t]he trial court has the discretion to determine whether or when special briefing or other proceedings are needed to investigate reliability.”); *see also Hunt*, ___ N.C. App. at ___, 792 S.E.2d at 560 (“*Daubert* did not work a seachange [sic] over . . . evidence law, and the trial court’s role as gatekeeper is not intended to serve as a replacement for the adversary system.”). Moreover, “[i]n simpler cases . . . the area of testimony may be sufficiently common or easily understood that the testimony’s foundation can be laid with a few questions in the presence of the jury.” *Id.* Here, in the presence of the jury, Ngong’s testimony adequately established a Rule 702(a) foundation for her opinion that the rocks seized from Defendant contained cocaine. Therefore, the trial court was not required to conduct further inquiry into the reliability of her testimony.

Finally, we note that Defendant’s argument does not claim that Ngong’s testimony is unreliable because GCMS is an inherently unreliable method for identifying controlled substances.⁴ Defendant attacks the particular GCMS testing process used by the CMPD Crime Lab. However, because a proper Rule 702(a) foundation was established, any procedural shortcomings of the CMPD Crime Lab, had they been raised during trial, would go to the weight of Ngong’s expert opinion, not its admissibility. *See State v. Hunt*, ___ N.C. App. at ___, 790 S.E.2d at 880 (holding that when a qualified expert witness relies on chemical analysis to identify a controlled substance, any deviation the expert “might have taken from the *established methodology* went to the weight of his testimony, not the admissibility of the testimony” (emphasis added)), *review denied*, 369 N.C. 197, 795 S.E.2d 206 (2016).

4. Defendant admits that using GCMS to identify controlled substances is considered to be a scientifically valid method. Under *Daubert* “[w]idespread acceptance can be an important factor in ruling particular evidence admissible[.]” *Daubert*, 509 U.S. at 594, 113 S. Ct. at 2797.

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Based upon the evidence presented through the adversarial process, the trial court did not err by admitting Ngong's expert testimony. Since there was no error in admitting Ngong's testimony, Defendant is unable to show plain error. *State v. Baker*, 338 N.C. 526, 554, 451 S.E.2d 574, 591 (1994) ("Since there was no error, there could be no plain error.").

CONCLUSION

The trial court did not commit error by admitting Ngong's expert opinion testimony under Rule 702.

NO ERROR.

Judges BRYANT and ARROWOOD concur.

STATE OF NORTH CAROLINA

v.

DAVID HINES, JR.

No. COA17-968

Filed 1 May 2018

1. Motor Vehicles—driving while impaired—corpus delicti rule—evidence sufficient

The trial court did not err in an impaired driving prosecution by denying defendant's motion to dismiss based on the corpus delicti rule. A Highway Patrol Trooper was called to the scene of a one-car accident where he found defendant's vehicle nose down in a ditch and defendant sitting on the tailgate of his vehicle exhibiting signs of intoxication. Defendant told the Trooper that he was the only person in the vehicle and that he had "hit the ditch" after running a stop sign. The State offered sufficient corroborating evidence independent of defendant's statement that he was the driver of the wrecked vehicle, including that one shoe was found in the truck and that defendant was wearing the other, and that the wreck could not otherwise be explained.

2. Motor Vehicles—habitual impaired driving—driving with revoked license

There was sufficient evidence to deny defendant's motion to dismiss charges of habitual impaired driving and driving with

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a revoked license where defendant stipulated to three previous convictions of DWI within ten years and that his license had been revoked for an impaired driving conviction.

3. Motor Vehicles—reckless driving to endanger—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of reckless driving to endanger. The State's evidence satisfied the corpus delicti rule and showed that defendant's single-vehicle accident resulted in both property damage to the vehicle and personal injury to defendant.

Appeal by defendant from judgments entered 16 March 2017 by Judge W. Douglas Parsons in Johnston County Superior Court. Heard in the Court of Appeals 3 April 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General William H. Harkins, Jr., for the State.

William D. Spence for defendant-appellant.

BRYANT, Judge.

Where defendant's admitted that he was the driver of the vehicle, and the State presented sufficient independent corroborating evidence that defendant was the driver of the vehicle, the *corpus delicti* rule is satisfied and the State did not err in denying defendant's motion to dismiss the charges against him. We find no error in the judgments of the trial court.

Around 10:00 p.m. on 9 April 2016, volunteer firefighter Brent Driver ("Brent") was off duty when he saw an unknown female standing in the middle of the road waving her arms back and forth on Princeton Kenly Road in Johnston County. Brent stopped, and the woman told him that a wreck had occurred, and that she had already called 911. Brent's passenger, another firefighter, went and checked the car—a white Rodeo SUV which was nose-down in a ditch on the side of the road—"to see if there was [sic] any fluids leaking from the vehicle, gas or anything like that." Brent then observed defendant David Hines, Jr., leaning against the back of the white Rodeo. Brent testified that defendant "smelled [of a] real high odor of alcohol and couldn't maintain his balance or anything." Brent asked defendant to come and sit in the back of Brent's truck "so [defendant] didn't fall and hurt himself."

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Brent noted that defendant was wearing only one white shoe. An identical white shoe was found in the driver's side floorboard of the white Rodeo. Brent also observed a cut on defendant's forehead.

Trooper Chris Bell with the North Carolina State Highway Patrol responded to the scene of the accident. He first spoke with Brent, who told him that the driver of the white Rodeo—defendant—was sitting in the tailgate of his truck. As Trooper Bell approached defendant, he noticed that defendant had “a distinct sway,” “bloodshot” and “glassy eyes,” and he also “[d]etected a very strong odor of alcohol.”

Trooper Bell asked defendant for his driver's license, and defendant responded that he did not have one. Instead, he provided Trooper Bell with an ID card containing defendant's picture, name, and date of birth. When Trooper Bell asked about the accident, defendant told him he was not familiar with the area, he was the only person present in the vehicle at the time of the accident, and that he “hit the ditch” when he ran a stop sign driving approximately sixty miles per hour.

Trooper Bell then asked defendant to fill out a standard witness statement form, which he handed to defendant as he sat on the tailgate of Brent's truck. Trooper Bell stepped away to call a tow truck, and when he returned to retrieve the witness statement from defendant about ten to fifteen minutes later, he discovered defendant “laying in the bed of the truck, passed out.”

Trooper Bell retrieved the witness statement form, noting that defendant had only signed and dated the form without providing a statement. Based on the information given him by defendant, Trooper Bell proceeded to fill out the witness statement in his own handwriting.

At some point, Trooper Bell asked defendant to submit to a portable breath test, and defendant refused. Defendant was then arrested for driving while impaired (“DWI”), handcuffed, placed in the front passenger seat of Trooper Bell's patrol car, and driven to the Johnston County courthouse's Intoximeter room. Once there, defendant was read his rights but refused to provide “any kind of sample” for analysis and also refused standardized field sobriety testing later at the jail. Trooper Bell obtained a warrant for defendant's blood sample, and defendant was transported to Johnston Medical Center in Smithfield. Defendant's blood was drawn, and the sample was submitted to the State crime lab for analysis.

On 9 April 2016, defendant was charged with DWI, driving while license revoked (“DWLR”), and careless and reckless driving. The case

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was called for trial before the Honorable W. Douglas Parsons, Judge presiding, during the 13 March 2017 Criminal Session of Johnston County Superior Court. The trial court denied defendant's pretrial motion to suppress, and defendant was tried before a jury.

Defendant stipulated that he had been previously convicted of DWI three separate times, with his counsel acknowledging that "[h]e's eligible for habitual DWI." Defendant also stipulated that his license was revoked at the time of the accident on 9 April 2016.

Erin Cosme, a forensic toxicologist with the North Carolina State Crime Laboratory, was qualified as an expert witness without objection. Cosme testified about the chain of custody regarding defendant's blood sample taken the day of the accident and testified that defendant's sample revealed a blood ethanol concentration of 0.33 grams of alcohol per 100 milliliters.

At the close of the State's evidence, defendant moved to dismiss all charges for insufficiency of the evidence pursuant to N.C. Gen. Stat. § 15A-1227 and the *corpus delicti* rule. The trial court denied the motion to dismiss, noting that in addition to defendant's own admission to Trooper Bell that he was driving the white Rodeo on the day of the accident, there was also corroboration of the *corpus delicti*, the crime. Defendant did not present any evidence.

The jury found defendant guilty of DWI, DWLR, and careless and reckless driving. Defendant admitted to aggravating factors, and he was sentenced to twenty-four months minimum, thirty-eight months maximum on the felony DWI. Defendant was also sentenced to 120 days for the misdemeanors of DWLR and careless and reckless driving. Defendant appeals.

On appeal, defendant argues the trial court erred in denying his motion to dismiss the charges of (I) habitual impaired driving; (II) driving while license revoked; and (III) reckless driving to endanger.

I & II

[1] Defendant first argues the trial court erred in denying his motions to dismiss the charges of (I) habitual impaired driving and (II) driving while license revoked. Specifically, defendant contends that the trial court erred in denying his motions to dismiss under the *corpus delicti* rule, where a trooper testified that defendant admitted at the scene that he was the driver of the wrecked car but where there was otherwise

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no corroborative evidence, independent of defendant's extra-judicial confession. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)).

"When the State relies upon a defendant's extrajudicial confession, we apply the *corpus delicti* rule 'to guard against the possibility that a defendant will be convicted of a crime that has not been committed.' *State v. Cox*, 367 N.C. 147, 151, 749 S.E.2d 271, 275 (2013) (quoting *State v. Parker*, 315 N.C. 222, 235, 337 S.E.2d 487, 494 (1985)). "This inquiry is preliminary to consideration of whether the State presented sufficient evidence to survive the motion to dismiss." *Id.*

The *corpus delicti* rule is historically grounded on three policy justifications: (1) to "protect[] against those shocking situations in which alleged murder victims turn up alive after their accused killer has been convicted and perhaps executed"; (2) to "ensure[] that confessions that are erroneously reported or construed, involuntarily made, mistaken as to law or fact, or falsely volunteered by an insane or mentally disturbed individual cannot be used to falsely convict a defendant"; and (3) "to promote good law enforcement practices [by] requir[ing] thorough investigations of alleged crimes to ensure that justice is achieved and the innocent are vindicated."

Id. (alterations in original) (quoting *State v. Smith*, 362 N.C. 583, 591–92, 669 S.E.2d 299, 305 (2008)). "Traditionally, our *corpus delicti* rule has required the State to present corroborative evidence, independent of the defendant's confession, tending to show that '(a) the injury or harm constituting the crime occurred [and] (b) this injury was done in a criminal manner.' " *Id.* (citation omitted) (quoting *Smith*, 362 N.C. at 589, 669 S.E.2d at 304).

[T]he [*corpus delicti*] rule requires the State to present evidence tending to show that the crime in question

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occurred. The rule does not require the State to logically exclude every possibility that the defendant did not commit the crime. Thus, if the State presents evidence tending to establish that the injury or harm constituting the crime occurred and was caused by criminal activity, then the *corpus delicti* rule is satisfied and the State may use the defendant's [sic] confession to prove his identity as the perpetrator.

Id. at 152, 749 S.E.2d at 275 (citing *State v. Trexler*, 316 N.C. 528, 533, 342 S.E.2d 878, 881 (1986)). "Significantly, however, 'a confession identifying *who committed the crime* is not subject to the *corpus delicti* rule.'" *State v. Sawyers*, ___ N.C. App. ___, ___, 808 S.E.2d 148, 152 (2017) (citation omitted) (quoting *State v. Ballard*, 244 N.C. App. 476, 480, 781 S.E.2d 75, 78 (2015)).

In *Trexler*, a DWI case, the defendant admitted that he wrecked his car after drinking, left the scene, and returned a short time later. 316 N.C. at 533, 342 S.E.2d at 881. The trial court concluded that the following independent evidence established the *corpus delicti*, the crime: an overturned car was lying in the middle of the road; when the defendant returned to the scene, he appeared impaired from alcohol; the defendant measured a .14 on the breathalyzer; and the wreck was otherwise unexplained. *Id.* The North Carolina Supreme Court held that the trial court did not err when it denied the defendant's motion to dismiss based on the defendant's argument that the State failed to prove the *corpus delicti* of impaired driving. *Id.* at 535, 342 S.E.2d at 882.

In the instant case, in addition to defendant's statement to Trooper Bell that he was the driver of the wrecked vehicle and defendant's appearance of intoxication, the State presented sufficient independent corroborating evidence that defendant had been driving the wrecked vehicle while impaired: (1) the wrecked vehicle found nose down in a ditch; (2) one shoe was found in the driver's side footwell of the vehicle, and defendant was wearing the matching shoe; (3) no one else was in the area at the time of the accident other than defendant, who appeared to be appreciably impaired; (4) defendant had an injury—a cut on his forehead—consistent with having been in a wreck; and (5) the wreck of the white Rodeo could not otherwise be explained. As to independent evidence of defendant's impairment, the State's expert witness in toxicology testified that defendant's blood sample taken the date of the accident had a blood ethanol concentration of 0.33 grams of alcohol per 100 milliliters as defined by N.C. Gen. Stat. § 20-4.01.

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Accordingly, pursuant to *Trexler*, the State offered sufficient corroborating evidence independent of defendant's own admission to Trooper Bell that he was the driver of the wrecked vehicle, and the trial court did not err in denying defendant's motion to dismiss based on the *corpus delicti* rule.

[2] As for defendant's motion to dismiss based on the insufficiency of the evidence, this argument also fails.

A person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within 10 years of the date of this offense.

N.C. Gen. Stat. § 20-138.5(a) (2017). "To convict a defendant under N.C. Gen. Stat. § 20-28(a) of driving while his license is revoked the State must prove beyond a reasonable doubt (1) the defendant's operation of a motor vehicle (2) on a public highway (3) while his operator's license is revoked." *State v. Richardson*, 96 N.C. App. 270, 271, 385 S.E.2d 194, 195 (1989) (citing *State v. Atwood*, 290 N.C. 266, 271, 225 S.E.2d 543, 545 (1976)).

At trial, defendant stipulated that on 9 April 2016, his license was revoked for an impaired driving conviction. He also stipulated to three previous convictions for DWI within ten years of 9 April 2016: on 11 January 2013 in Wilson County; on 3 April 2008 in Nash County; and on 17 October 2008 in Wilson County. As such, defendant has met the statutory requirements for habitual DWI pursuant to N.C. Gen. Stat. § 20-138.5(a) and DWLR pursuant to N.C. Gen. Stat. § 20-28(a), and the trial court did not err in denying defendant's motion to dismiss for insufficiency of the evidence pursuant to N.C. Gen. Stat. § 15A-1227. Defendant's arguments are overruled.

III

[3] Defendant argues the trial court erred in denying his motion to dismiss the charge of reckless driving to endanger for the same reasons enunciated in Sections I & II, or in the alternative, because the State's evidence was insufficient to withstand defendant's motion to dismiss.

The essential elements of the charge of reckless driving to endanger include the following:

- (a) Any person who drives any vehicle upon a highway or any public vehicular area carelessly and heedlessly in

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willful or wanton disregard of the rights or safety of others shall be guilty of reckless driving.

- (b) Any person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving.

N.C. Gen. Stat. § 20-140(a)–(b) (2017).

For the reasons stated in Sections I & II, the *corpus delicti* rule was satisfied by the State’s evidence presented in the trial court. Defendant admitted to Trooper Bell that he was the driver of the wrecked vehicle and that he was not familiar with the area and ran a stop sign going sixty miles per hour before crashing, and defendant appeared intoxicated at the scene. Thus, the State presented sufficient independent corroborating evidence that defendant was recklessly driving the vehicle while impaired.

In *Sawyers*, the defendant was charged with and convicted of, *inter alia*, DWI, DWLR, and reckless driving. ___ N.C. App. at ___, 808 S.E.2d at 151–52. On appeal, the defendant argued the State presented insufficient evidence, independent of the defendant’s own extrajudicial confession to a state trooper, to establish that he was driving the car. This Court noted that the “[d]efendant’s argument demonstrate[d] a common misunderstanding of the *corpus delicti* rule[,]” and that the State had “presented substantial evidence to establish that the cause of the car accident was criminal activity, i.e. reckless and impaired driving.” *Id.* at ___, 808 S.E.2d at 152. This Court reasoned that “[w]hile it may have been unclear at that time whether [the] defendant or [another individual] was the driver, the *corpus delicti* rule merely ‘requires the State to present evidence tending to show that the crime in question occurred.’ ” *Id.* (quoting *Cox*, 367 N.C. at 152, 749 S.E.2d at 275). The State’s evidence included the fact that the driver of the car had been speeding and driving in an unsafe manner and both of the vehicle’s occupants were emanating an odor of alcohol. *Id.* Accordingly, this Court determined the *corpus delicti* rule had been satisfied. *Id.* (citation omitted).

In the instant case, the State presented sufficient evidence that defendant’s single-vehicle accident, which resulted from impaired driving, speeding, and running a stop sign, resulted in both property damage to the wrecked vehicle and personal injury to defendant. As such, the State presented sufficient evidence that defendant operated the white Rodeo on 9 April 2016 while impaired and in a reckless manner, sufficient to satisfy the elements of that crime. *See* N.C.G.S. § 20-140(a)–(b). Accordingly, the

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trial court did not err in denying defendant's motion to dismiss the reckless and careless driving charge, and defendant's argument is overruled.

NO ERROR.

Judges CALABRIA and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
ROBERT DWAYNE LEWIS

No. COA17-888

Filed 1 May 2018

1. Search and Seizure—search warrant—probable cause—vehicles

A warrant application established probable cause to search two cars for evidence of armed robberies where the accompanying affidavit described witnesses' accounts of four similar robberies and the fact that the two makes and models of the getaway cars were found at the residence where the suspect was arrested.

2. Search and Seizure—search warrant—probable cause—residence—connection between suspect and residence

A warrant application failed to establish probable cause to search a residence for evidence of armed robberies where the only information in the accompanying affidavit connecting the suspect (defendant) to the residence was a statement that defendant was arrested at the location. Nothing suggested that defendant may have stowed incriminating evidence in the residence.

Appeal by defendant from judgments entered 7 February 2017 by Judge Richard T. Brown in Hoke County Superior Court. Heard in the Court of Appeals 22 February 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Milind Dongre, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant.

DIETZ, Judge.

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Defendant Robert Dwayne Lewis appeals his convictions for three counts of armed robbery, one count of attempted armed robbery, and five counts of kidnapping related to a string of robberies at businesses in Hoke County. After the trial court denied his motion to suppress, Lewis pleaded guilty to all charges, reserving his right to appeal the denial of his motion to suppress.

On appeal, Lewis argues that the trial court erred in denying his motion to suppress because the affidavit law enforcement submitted with its search warrant application was insufficient to establish probable cause for a search of the cars and house where the evidence was found. As explained below, the warrant application and accompanying affidavit contained sufficient information to establish probable cause to search the two vehicles allegedly involved in the crimes. But we agree with Lewis that the warrant application did not contain sufficient information to establish probable cause to search the home. We therefore vacate Lewis's convictions and remand this case for further proceedings consistent with this opinion.

Facts and Procedural History

On 21 September 2014, a man wearing a blue mask, dark clothing, and carrying a handgun robbed a dollar store in Hoke County and fled in a blue Nissan Titan. Witnesses described the suspect as calm and composed. Five days later, another dollar store was robbed. Again, witnesses described the suspect as a composed man, wearing a blue mask and dark clothing, and carrying a handgun. The man ordered two people into a bathroom before fleeing the scene. Two days later, a third dollar store was robbed. Once again, witnesses described the suspect as a man in a blue mask, carrying a handgun. And again, the man ordered people into a bathroom before fleeing.

Detective William Tart of the Hoke County Sheriff's Office was assigned to the case. Tart got a break in the case several weeks later on 19 October 2014, when law enforcement in Smithfield notified him that a man in a blue head cover, dark clothing, and carrying a handgun robbed a business in neighboring Johnston County. The Smithfield police reported that they saw the suspect flee in a Kia Optima and were able to identify him from a previous encounter as Defendant Robert Dwayne Lewis. The same day, Smithfield police issued an arrest warrant for Lewis.

Hoke County Sheriff's Deputy Tim Kavanaugh, acting on information from the Johnston County investigation, drove to Lewis's address, 7085 Laurinburg Road in Hoke County, and saw a blue Nissan pickup

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truck parked in the yard matching the description of the Nissan Titan witnesses saw during the first robbery. Deputy Kavanaugh did not see the Kia Optima that officers saw during the fourth robbery.

Deputy Kavanaugh continued his normal patrol duties and then drove past 7085 Laurinburg Road again later in the day. This time he saw a Kia Optima in the yard of the house. Kavanaugh parked nearby and watched the house until he observed a man matching Lewis's description walk from the house out to the mailbox and take mail out. Kavanaugh approached the man and asked him for his name. The man said "Robert Lewis" and Kavanaugh placed him under arrest.

After arresting Lewis, Deputy Kavanaugh walked up to the front door of the home at 7085 Laurinburg Road and spoke to a man who identified himself as Waddell McCollum, Lewis's stepfather. Kavanaugh asked McCollum if Lewis lived at the residence and also asked who owned the vehicles parked in the yard. McCollum told Kavanaugh that Lewis lived there, that the Nissan truck belonged to McCollum but Lewis sometimes drives it, and that the Kia belonged to Lewis. After speaking with McCollum at the front door of the house, Kavanaugh "went over to the Kia that was in the yard, and looked inside of the passenger area, the rear of the vehicle" and saw "a BB&T money bag on the passenger floor of the vehicle" as well as some dark clothing. The Kia was "backed into the yard, in front of the residence, not in the driveway but in the grass" about twenty feet from the front porch where Kavanaugh spoke to McCollum.

After law enforcement arrested Lewis, Detective Tart prepared a search warrant application to search the residence at 7085 Laurinburg Road where Lewis was arrested and the blue Nissan Titan and Kia Optima on the premises.

The affidavit accompanying the application provided a detailed description of each of the two vehicles, including color, year, make and model, NC registration number, and VIN number. The affidavit also described the three September 2014 Hoke County robberies and the October 2014 Johnston County robbery, including the similarities between the four robberies and the descriptions of the suspect in each robbery. It further provided that Smithfield police identified the suspect in the Johnston County robbery as Lewis, that officers saw Lewis flee the scene in a Kia Optima, and that Hoke County officers then arrested Lewis at a residence located at 7085 Laurinburg Road. The affidavit stated that a witness observed the suspect in the first robbery flee in a dark blue Nissan Titan and that the witness's description of that vehicle

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was consistent with a dark blue Nissan Titan officers observed at the 7085 Laurinburg Road address while arresting Lewis. The search warrant application did not include any reference to what Deputy Kavanaugh had observed when he walked into the yard and looked in the window of the Kia Optima.

Based on the information provided in the affidavit, a magistrate issued a search warrant for the residence and the two vehicles. Hoke County officers executed the warrant the same day and seized various evidence. In the Kia, officers found a BB&T bank bag containing documents connected to the Smithfield business that was robbed, a blue helmet liner that was consistent with the blue head covering worn by the suspect in the Hoke County robberies, and a rusted handgun.

On 21 September 2015, the State indicted Lewis for three counts of robbery with a dangerous weapon, one count of attempted robbery with a dangerous weapon, and five counts of second degree kidnapping related to the three September 2014 Hoke County robberies.

Lewis filed a motion to suppress the evidence recovered during the execution of the search warrant, arguing that the search warrant application did not provide probable cause for the search. Lewis argued that the warrant affidavit failed to establish a sufficient nexus between the evidence being sought and the places to be searched. Lewis also argued that the evidence Deputy Kavanaugh saw through the window of the Kia Optima was not admissible under the plain view doctrine.

The trial court heard the motion to suppress on 7 April 2016. Detective Tart and Deputy Kavanaugh both testified at the hearing. Tart described the steps he took in his investigation of the robberies, how he determined the four robberies were connected, and how he obtained Lewis's name, the 7085 Laurinburg Road address, and identified the two vehicles linked to the robberies. Deputy Kavanaugh described his actions on 19 October 2014, including receiving information about the fourth robbery, which lead to his arrest of Lewis and his observations through the window of the Kia.

On 3 June 2016, the trial court denied Lewis's motion to suppress, finding that the search warrant affidavit was sufficient to establish probable cause for the search and that the evidence Deputy Kavanaugh observed through the window of the Kia was admissible under the plain view doctrine. On 7 February 2017, Lewis pleaded guilty to all of the charges, reserving his right to appeal the denial of his motion to suppress. The trial court sentenced Lewis to three consecutive terms of 103-136 months in prison. Lewis timely appealed.

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Analysis

Lewis argues that the trial court erred in denying his motion to suppress because the affidavit Detective Tart submitted with the search warrant application was insufficient to establish probable cause for a search of the house and two cars at 7085 Laurinburg Road, rendering the search warrant and search invalid. Lewis contends that the affidavit failed to establish a connection between him, the address on Laurinburg Road, the two cars listed on the warrant, and the crimes. As explained below, we hold that the warrant established probable cause to search the two vehicles located at 7085 Laurinburg Road, but not the home itself.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "We review *de novo* a trial court's conclusion that a magistrate had probable cause to issue a search warrant." *State v. Worley*, __ N.C. App. __, __, 803 S.E.2d 412, 416 (2017).

A search warrant affidavit must contain sufficient information to establish probable cause "to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." *State v. Arrington*, 311 N.C. 633, 636, 319 S.E.2d 254, 256 (1984). "A magistrate must make a practical, common-sense decision, based on the totality of the circumstances, whether there is a fair probability that contraband will be found in the place to be searched." *State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015). "[T]he affidavit in support of a search warrant must establish a nexus between the objects sought and the place to be searched." *State v. Oates*, 224 N.C. App. 634, 644, 736 S.E.2d 228, 235 (2012).

"This standard for determining probable cause is flexible, permitting the magistrate to draw reasonable inferences from the evidence in the affidavit supporting the application for the warrant." *McKinney*, 368 N.C. at 164, 775 S.E.2d at 824–25 (citations omitted). "That evidence is viewed from the perspective of a police officer with the affiant's training and experience and the commonsense judgments reached by officers in light of that training and specialized experience." *Id.* at 164–65, 775 S.E.2d at 825 (citations omitted). "When reviewing a magistrate's determination of probable cause, this Court must pay great deference and sustain the magistrate's determination if there existed a substantial basis for the magistrate to conclude that articles searched for were probably

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present.” *State v. Parson*, __ N.C. App. __, __, 791 S.E.2d 528, 536 (2016). In doing so, this Court “should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner.” *State v. Allman*, 369 N.C. 292, 294, 794 S.E.2d 301, 303 (2016). “The resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.” *State v. Riggs*, 328 N.C. 213, 222, 400 S.E.2d 429, 435 (1991). “[A]s long as the pieces fit together well and yield a fair probability that a police officer executing the warrant will find contraband or evidence of a crime at the place to be searched, a magistrate has probable cause to issue a warrant.” *Allman*, 369 N.C. at 294, 794 S.E.2d at 303.

With this precedent in mind, we turn to Lewis’s arguments on appeal. At the outset, we acknowledge that the warrant application is missing a key fact known to law enforcement that, if included, would have made this a far easier case. Specifically, the warrant application did not describe how the officers linked Lewis to the 7085 Laurinburg Road address—for example, there is no statement in the warrant application that, after identifying Lewis as the suspect, law enforcement searched records and determined that 7085 Laurinburg Road was Lewis’s current residence. The only information in the affidavit linking Lewis to 7085 Laurinburg Road is the fact that officers arrested Lewis at that location.

[1] We begin with the probable cause to search the two vehicles located at that residence. Although the affidavit could have been more detailed, we hold that it contained enough information, together with reasonable inferences drawn from that information, to establish a substantial basis to believe that the evidence sought probably would be found in the blue Nissan Titan and Kia Optima located at 7085 Laurinburg Road. *Parson*, __ N.C. App. at __, 791 S.E.2d at 536; *Allman*, 369 N.C. at 294, 794 S.E.2d at 303; *see also State v. Spillars*, 280 N.C. 341, 350, 185 S.E.2d 881, 887 (1972).

Specifically, Detective Tart’s affidavit described the four robberies in detail including similarities in the manner of the crimes and the descriptions of the suspect. All four robberies involved a suspect with a blue cover over his head and face, wearing dark clothing, and carrying a handgun who robbed retail locations in a relatively close geographic area. The affidavit also stated that witnesses saw the suspect in the first robbery leave the scene in a dark blue Nissan Titan with North Carolina registration. A law enforcement officer saw the suspect in the fourth robbery flee the scene in a Kia Optima. That officer identified the suspect as Lewis based on a previous encounter with him in which the officer was concerned that Lewis was casing a different retail location.

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Finally, the affidavit stated that officers located and arrested Lewis at 7085 Laurinburg Road and, while making the arrest, saw a dark blue Nissan Titan at that location.

The affidavit also contained much more detailed information about the two vehicles to be searched, including the color, year, make, model, NC registration, and VIN number for each vehicle. The affidavit did not explain how law enforcement obtained this information.

But even setting this detailed information aside, the affidavit contained sufficient information to justify a search of a dark blue Nissan Titan and a Kia Optima found at 7085 Laurinburg Road. The affidavit established probable cause to believe Lewis was the suspect who committed four robberies at retail establishments in Hoke and Johnston counties while wearing a blue face cover and dark clothing, and carrying a handgun. In the first robbery, witnesses saw the suspect flee in a dark blue Nissan Titan. In the fourth robbery—which occurred the same day that Detective Tart submitted the warrant application and affidavit—a law enforcement officer saw Lewis flee the scene of the robbery in a Kia Optima. Later on the same day of the fourth robbery, officers arrested Lewis at 7085 Laurinburg Road and saw a dark blue Nissan Titan at that location during the arrest.

Simply put, the “pieces fit together well and yield a fair probability that a police officer executing the warrant will find contraband or evidence of a crime at the place to be searched.” *Allman*, 369 N.C. at 294, 794 S.E.2d at 303. There was evidence that the same suspect committed four robberies, the first while driving a dark blue Nissan Titan and the fourth while driving a Kia Optima. Later on the same day of the fourth robbery, officers arrested Lewis. When they located him they saw—of all the makes, models, and colors of all the vehicles in the world—a dark blue Nissan Titan, matching the description of the vehicle used in the first robbery. These facts were more than sufficient for the magistrate to conclude that, if officers returned to that location and found a dark blue Nissan Titan and a Kia Optima there, there was probable cause to believe those vehicles contained evidence connected to the robberies. *Parson*, __ N.C. App. at __, 791 S.E.2d at 536; *Allman*, 369 N.C. at 294, 794 S.E.2d at 303. Accordingly, we hold that there was probable cause to issue a search warrant for the dark blue Nissan Titan and Kia Optima located at 7085 Laurinburg Road.

[2] Lewis also challenges the search of the residence at 7085 Laurinburg Road. We agree with Lewis that the warrant application and affidavit fail to establish probable cause to search this home. As the State concedes, although Lewis resided at 7085 Laurinburg Road, the affidavit does

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not say that. The only information in the affidavit tying Lewis to 7085 Laurinburg Road is the statement that Hoke County officers observed a dark blue Nissan Titan “at the residence of 7085 Laurinburg Road . . . when serving a felony arrest warrant on Robert Lewis issued by Smithfield Police Department.” As explained above, this statement is sufficient to establish that Lewis was *found* at that location; but it does not follow from that statement that Lewis also must *reside* at that location. Indeed, from the information in the affidavit, 7085 Laurinburg Road could have been a someone else’s home with no connection to Lewis at all. That Lewis visited that location, without some indication that he may have stowed incriminating evidence there, is not enough to justify a search of the home. *See McKinney*, 368 N.C. at 165–66, 775 S.E.2d at 825–26; *State v. Campbell*, 282 N.C. 125, 131–32, 191 S.E.2d 752, 756–57 (1972). Accordingly, we agree with Lewis that the trial court should have granted his motion to suppress with respect to the search of the home.

On appeal, neither party addressed which evidence officers seized from the vehicles and which evidence they seized from the home, and the record on appeal is insufficient for this Court to answer the question. Accordingly, we vacate Lewis’s convictions and remand this case with instructions for the trial court to allow Lewis’s motion to suppress the evidence seized from the residence located at 7085 Laurinburg Road. The trial court properly denied the motion to suppress with respect to the vehicles, and any evidence seized in those separate searches is admissible. *See State v. Edwards*, 185 N.C. App. 701, 704, 649 S.E.2d 646, 649 (2007); *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006).

In light of our ruling, we need not address Lewis’s argument that a separate search of the Kia Optima was not supported by the plain view doctrine. The incriminating evidence that this other officer saw through the car window (a bank bag from BB&T and dark clothing) was not included in the warrant application and accompanying affidavit. Thus, even if this search through the car window was impermissible, it would not render the search warrant, based on separate evidence, invalid. *McKinney*, 361 N.C. at 59, 637 S.E.2d at 873.

Conclusion

For the reasons discussed above, we vacate the trial court’s judgments and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges HUNTER, JR. and ARROWOOD concur.

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[259 N.C. App. 374 (2018)]

STATE OF NORTH CAROLINA

v.

KELLY LOCKLEAR

No. COA17-982

Filed 1 May 2018

1. Criminal Law—flight—instructions—sufficiency of evidence—prejudice

There was insufficient evidence to support an instruction on flight in a prosecution for charges including insurance fraud which arose from the burning of defendant's house where there was no more than a suspicion or conjecture that defendant fled the scene and no evidence that defendant took steps to avoid prosecution. However, giving the instruction was not prejudicial error because it was most directly related to the charge of setting fire to a dwelling house, of which defendant was found not guilty.

2. False Pretense—obtaining property—instruction—indictment

The trial court erred in a prosecution for obtaining property by false pretense in a case arising from the burning of defendant's house where the trial court failed to mention the misrepresentation specified in the indictment. There was a probable impact on the jury's finding because the erroneous instruction allowed the jury to convict defendant on a theory not alleged in the indictment, and it was unlikely that the jury would have convicted defendant on the theory alleged in the indictment.

3. Fraud—insurance—burning building—denying setting fire

The trial court's instructions in an insurance fraud case were plain error where the instructions allowed the jury to convict defendant of insurance fraud on a theory not alleged in the indictment and it was unlikely that the jury would have convicted on the theory alleged in the indictment.

Appeal by defendant from judgments entered 2 May 2016 by Judge James G. Bell in Robeson County Superior Court. Heard in the Court of Appeals 21 February 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Lynne Weaver, for the State.

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Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant.

ARROWOOD, Judge.

Kelly Locklear (“defendant”) appeals from judgments entered on her convictions for obtaining property by false pretense and insurance fraud. For the following reasons, defendant is entitled to a new trial.

I. Background

On 10 October 2011, defendant was indicted by a Robeson County Grand Jury on charges of occupant or owner setting fire to a dwelling house, making a false report to a law enforcement officer or agency, insurance fraud, and obtaining property by false pretense. The charges stem from a fire at defendant’s house on 5 March 2010 and defendant’s ensuing insurance claims.

Defendant’s case was tried before a jury in Robeson County Superior Court beginning on 18 April 2016, the Honorable James G. Bell, Judge presiding. On 2 May 2016, the jury returned verdicts finding defendant not guilty of setting fire to a dwelling house and making a false report to a law enforcement officer and finding defendant guilty of obtaining property by false pretense and insurance fraud. The court entered orders on the not guilty verdicts and entered judgments on the guilty verdicts. For both convictions, the court determined mitigated sentences were justified. The court sentenced defendant to a term of 5 to 6 months for obtaining property by false pretense and suspended the sentence on condition that defendant be placed on supervised probation for 36 months. The trial court sentenced defendant to a consecutive term of 5 to 6 months for insurance fraud and suspended the sentence on condition that defendant be placed on supervised probation for 36 months. On 11 May 2016, defendant filed a *pro se* notice of appeal, followed by a *pro se* amended notice of appeal.

II. Discussion

On appeal, defendant challenges her convictions by raising three issues concerning the trial court’s jury instructions and one issue concerning the trial court’s response to a jury question. However, before reaching defendant’s arguments, we must first address deficiencies in defendant’s notices of appeal.

Pertinent to this case, Rule 4 of the North Carolina Rules of Appellate Procedure provides that

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[a]ny party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by . . . filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order

N.C.R. App. P. 4(a)(2) (2018). Rule 4 further provides

[t]he notice of appeal required to be filed and served by subdivision (a)(2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

N.C.R. App. P. 4(b).

In this case, there is nothing in the record to show that defendant served her *pro se* notices of appeal on the State. Furthermore, although defendant listed case numbers in the notices of appeal, defendant failed to indicate the judgments appealed from. Defendant has candidly acknowledged these deficiencies in a petition for writ of certiorari filed contemporaneously with her brief to this Court on 13 October 2017. Defendant requests that, if the deficiencies are fatal to her appeal, we allow the petition to reach the merits of her arguments.

Our appellate rules provide that “[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action” N.C.R. App. P. 21(a)(1) (2018). The State acknowledges that this Court has discretion to allow defendant’s petition to review the judgments entered 2 May 2016. In this instance, we exercise our discretion to allow defendant’s petition and we review the merits of the appeal.

A. Jury Instructions

The first three issues raised by defendant concern the trial court’s jury instructions. “It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence.” *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). “[Arguments] challenging the trial court’s decisions regarding jury instructions are reviewed *de novo* by this Court.” *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009); *see also State v. Barron*, 202 N.C. App. 686, 694, 690

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S.E.2d 22, 29, (“Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*.”), *disc. review denied*, 364 N.C. 327, 700 S.E.2d 926 (2010). “The prime purpose of a court’s charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence.” *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). “[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial.” *Id.* “However, an error in jury instructions is prejudicial and requires a new trial only if ‘there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.’” *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)).

Moreover, “[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires” N.C.R. App. P. 10(a)(2) (2018); *see also State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000).

In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). The North Carolina Supreme Court “has elected to review unpreserved issues for plain error when they involve . . . errors in the judge’s instructions to the jury” *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

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State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

1. Flight Instruction

[1] Defendant first contends the trial court erred in instructing the jury on flight. Defendant also asserts the flight instruction was prejudicial to her case.

The defense objected to the flight instruction during the charge conference. The trial court overruled defendant's objection and, prior to instructing the jury on the elements of any of the offenses, instructed the jury on flight as follows:

Flight. The State contends and the Defendant denies that the Defendant fled. Evidence of flight may be considered by you together with all other facts, and evidence, and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish Defendant's guilt.

"[F]light from a crime shortly after its commission is admissible as evidence of guilt, and a trial court may properly instruct on flight [s]o long as there is some evidence in the record reasonably supporting the theory that defendant fled after the commission of the crime charged[.]" *State v. Tucker*, 329 N.C. 709, 722, 407 S.E.2d 805, 813 (1991) (internal quotation marks and citations omitted). "Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991). "The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *State v. Norwood*, 344 N.C. 511, 534, 476 S.E.2d 349, 359 (1996). "Where there is some evidence supporting the theory of the defendant's flight, the jury must decide whether the facts and circumstances support the State's contention that the defendant fled." *Id.* at 535, 476 S.E.2d at 360. "[E]vidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so . . . should not be left to the jury." *State v. Lee*, 287 N.C. 536, 540, 215 S.E.2d 146, 149 (1975) (quotation marks and citation omitted).

Defendant contends the evidence in this case "raises no more than suspicion or conjecture that [she] engaged in behavior constituting

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‘flight’, or reflecting an admission or consciousness of guilt of the crimes charged.”

The evidence in this case was that defendant was at the house on the evening of 5 March 2010 prior to the fire. Defendant testified that she was only there several minutes to let the horses in the barn and she did not go in the house. Defendant said that she then left to look for her daughter and then went to her boyfriend’s house in Hoke County. Defendant stated that she did not pass anyone on her street as she left. The only evidence of flight was testimony from defendant’s neighbor, who lived in one of the three houses on the narrow dirt street. The neighbor testified that when he came home around “ten-ish” the evening of the fire, he spotted a car ahead of him as it came around the curve. The neighbor pulled over to the right side of the street to allow the car to pass and “a little white car passed [him] pretty quickly.” The car did not slow and the neighbor did not have time to look into the car as it passed. The neighbor knew that defendant drove a white Saturn but could not tell what type of white car passed him. The neighbor testified that the car that passed him was similar to defendant’s car and he assumed it was defendant’s car, but he could not see who was driving. As the neighbor rounded the curve, he thought he saw the house on fire and called 911. As the neighbor approached defendant’s house, he could no longer see the fire and thought he was mistaken. The neighbor later confirmed that the house was on fire and called 911 again.

We agree with defendant that this evidence raises no more than suspicion and conjecture that she fled the scene. Moreover, there is no evidence that defendant took steps to avoid apprehension. The evidence was that defendant was at her boyfriend’s house when her uncle, also a neighbor of defendant’s, called to tell her that her house was on fire. When defendant received the call, she immediately went back to her house with her boyfriend, where she spoke with first responders at the scene. Defendant then returned to the scene the following morning.

Because the evidence raises only a suspicion that defendant fled the scene of the fire and because there is no further evidence that defendant took steps to avoid apprehension, we hold there was insufficient evidence to support issuance of a flight instruction in this case. That error, however, was not prejudicial to defendant’s case. Although the flight instruction was given prior to any of the instructions for the charged offenses, it was most directly related to the charge of setting fire to a dwelling house, of which the jury found defendant not guilty. We are not convinced that the jury considered flight, found defendant not guilty of setting fire to a dwelling house, and then found defendant guilty of obtaining property by false pretense

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and insurance fraud based on defendant's alleged flight from the scene of the fire. Thus, we find no reasonable possibility of a different outcome had the flight instruction not been given. Defendant was not prejudiced by the erroneous flight instruction.

2. Obtaining Property by False Pretense Instructions

[2] Defendant also challenges the trial court's jury instructions for obtaining property by false pretense. Defendant contends the jury instructions for obtaining property by false pretense allowed the jury to convict on a theory not alleged in the indictment. Defendant did not object to the instructions below and, therefore, our review on appeal is limited to plain error, which defendant asserts.

"It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016) (internal quotation marks and citation omitted). Thus, "[i]f the indictment's allegations do not conform to the 'equivalent material aspects of the jury charge,' this discrepancy is considered a fatal variance." *State v. Ross*, __ N.C. App. __, __, 792 S.E.2d 155, 158 (2016) (quoting *State v. Williams*, 318 N.C. 624, 631, 350 S.E.2d 353, 357 (1986)).

In this case, the indictment for obtaining property by false pretense specified the false pretense and charged defendant as follows:

defendant . . . unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud, did obtain or attempt to obtain \$331,500.00 from North Carolina Farm Bureau Mutual Insurance Company by means of a false pretense which was calculated to deceive and did deceive. *The false pretense consisted of the following: filing a fire loss claim under the defendant's home owner insurance policy, when in fact the defendant had intentionally burned her own residence*, all against the form of the statute in such case made and provided and against the peace and dignity of the State.

(Emphasis added.)

During the charge conference, the parties agreed that the court would instruct the jury on obtaining property of value of \$100,000 or greater by false pretense and the lesser offense of obtaining property by false pretense where value is not at issue. The trial court was informed that both offenses were included in the same pattern jury instruction.

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The trial court then instructed the jury pursuant to pattern instruction N.C.P.I.–Crim. 219.10A without specifying the false pretense alleged in the indictment. The instructions for the first three elements of the offense provided only that the jury must find “that the Defendant made a representation to another[,]” “that the representation was false[,]” and “the representation was calculated and intended to deceive.”

The jury ultimately convicted defendant of the lesser obtaining property by false pretense offense. The portion of the jury instructions directly related to that lesser offense provided as follows:

Obtaining property by false pretense differs from obtaining property worth \$100,000 or more by false pretense in that the value of the property need not be worth \$100,000 or more. If you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant made a representation, the representation was false, the representation was calculated and intended to deceive, that the victim was in fact deceived by it, and the Defendant thereby obtained or attempted to obtain property from the victim, it would be your duty to return a verdict of guilty of obtaining property by false pretense. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Despite her failure to object below, defendant now contends these jury instructions “allowed the jury to find [her] guilty based on any and all possible misrepresentations that induced the insurance company to pay any money to her” and, therefore, “allowed the jury to convict [her] on a theory not alleged in the indictment.” Because the indictment specified that the false pretense consisted of “filing a fire loss claim under the defendant’s home owner insurance policy, when in fact the defendant had intentionally burned her own residence,” defendant argues the “pattern jury instruction should have been adapted to reflect the specific misrepresentation in the indictment” and “[t]he instruction should have required the jury to determine whether [she] obtained money from the insurance company based on the representation that she did not set fire to the house.”

Defendant relies on *State v. Linker*, 309 N.C. 612, 308 S.E.2d 309 (1983), in asserting the trial court erred. In *Linker*, our Supreme Court explained that

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[t]he gist of obtaining property by false pretense is the false representation of a subsisting fact intended to and which does deceive one from whom property is obtained. The state must prove, as an essential element of the crime, that defendant made the misrepresentation as alleged. If the state's evidence fails to establish that defendant made this misrepresentation but tends to show some other misrepresentation was made, then the state's proof varies fatally from the indictments. . . . This rule protects criminal defendants from vague and nonspecific charges and provides them notice so that if they have a defense to the charge as laid, they may properly and adequately prepare it without facing at trial a charge different from that alleged in the indictment.

Id. at 614-15, 308 S.E.2d at 310-11 (internal citations and footnote omitted). The *Linker* Court then reversed the defendant's conviction for obtaining property by false pretense and remanded with instructions to dismiss the indictments, with leave to the State to obtain other indictments, because the State's proof varied fatally from the allegations in the indictment. *Id.* at 616, 308 S.E.2d at 311.

In response to defendant's argument, the State distinguishes this case from *Linker*, arguing that in this case "there was no fatal variance between the offense charged and the proof, and the trial court was not required to set out each alleged misrepresentation in its instructions to the jury." The State asserts the indictment provided ample notice of the offense charged and that evidence was produced at trial to support the charged offense.

Upon review, we agree with the State that the indictment was sufficient to charge defendant with obtaining property by false pretense by "filing a fire loss claim under defendant's home owner insurance policy, when in fact the defendant had intentionally burned her own residence[.]" Additionally, we agree that the State put on evidence to support that charge. The issue on appeal, however, is not whether the indictment was sufficient to charge the offense or whether there was a fatal variance between the indictment and the proof; the issue raised on appeal is whether there is a fatal variance between the indictment and the jury instructions.

Although *Linker* addressed a fatal variance between the allegations in the indictment and the State's proof, we find the law in *Linker*, quoted above, is relevant in addressing a fatal variance between the indictment

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and the jury instructions. Namely, “[t]he state must prove, as an essential element of the crime, that defendant made the misrepresentation as alleged. If the state’s evidence fails to establish that defendant made this misrepresentation but tends to show some other misrepresentation was made, then the state’s proof varies fatally from the indictments.” *Linker*, 309 N.C. at 615, 308 S.E.2d at 311 (footnote omitted). Because “a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment[,]” *Barnett*, 368 N.C. at 713, 782 S.E.2d at 888, and “[t]he state must prove . . . that defendant made the misrepresentation as alleged[,]” *Linker*, 309 N.C. at 615, 308 S.E.2d at 311, it only makes sense that the trial court must instruct the jury on the misrepresentation as alleged in the indictment. It did not do so in this instance.

“It is clearly the rule in this jurisdiction that the trial court should not give instructions which present to the jury possible theories of conviction which are . . . not charged in the bill of indictment.” *State v. Taylor*, 304 N.C. 249, 274, 283 S.E.2d 761, 777 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398, *reh’g denied*, 463 U.S. 1249, 77 L. Ed. 2d 1456 (1983). Nevertheless, this Court has stated that “[a] jury instruction that is not specific to the misrepresentation in the indictment is acceptable so long as the court finds ‘no fatal variance between the indictment, the proof presented at trial, and the instructions to the jury.’” *State v. Ledwell*, 171 N.C. App. 314, 320, 614 S.E.2d 562, 566 (2005) (quoting *State v. Clemmons*, 111 N.C. App. 569, 578, 433 S.E.2d 748, 753 (1993)). In *Clemmons*, this Court held the trial court did not err in failing to mention the exact misrepresentation alleged in the indictment in the jury instruction because the State’s evidence corresponded to the allegation in the indictment. *Clemmons*, 111 N.C. App. at 578, 433 S.E.2d at 753. Similarly, in *Ledwell*, this Court held the trial court did not err in failing to instruct the jury as to the specific misrepresentation it needed to find based on the indictment, explaining that “[t]he State presented evidence of a single misrepresentation. There is no other misrepresentation that the jury could have found; therefore, there is no need to instruct the jury on the specific misrepresentation.” *Ledwell*, 171 N.C. App. at 320, 614 S.E.2d at 566-67.

In contrast to *Clemmons* and *Ledwell*, evidence was introduced at defendant’s trial of various misrepresentations in defendant’s insurance claim besides her denial that she had anything to do with setting the fire. Precisely, in addition to evidence of the misrepresentation alleged in the indictment—“filing a fire loss claim under the defendant’s home owner insurance policy, when in fact the defendant had intentionally

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burned her own residence”—evidence was introduced that defendant signed her ex-husband’s name on a deed, overstated the personal items allegedly destroyed in the fire, and sought money for rent that was not used for rent. Both defendant and the State have acknowledged evidence of these misrepresentations.

Where there is evidence of various misrepresentations which the jury could have considered in reaching a verdict for obtaining property by false pretense, we hold the trial court erred by not mentioning the misrepresentation specified in the indictment in the jury instructions for the offense. The fact that the trial court instructed pursuant to the pattern instructions does not change our holding. As defendant points out, and as our Supreme Court has recognized, “the pattern jury instructions themselves note, ‘*all pattern instructions should be carefully read and adaptations made, if necessary, before any instruction is given to the jury.*’ ” *State v. Walston*, 367 N.C. 721, 732, 766 S.E.2d 312, 319 (2014) (quoting 1 N.C.P.I.–Crim. at xix (“Guide to the Use of this Book”) (2014)).

The State further asserts that even if the trial court erred by not including the misrepresentation alleged in the indictment in the jury instructions, the error does not amount to plain error. The State quotes *State v. Barker*, 240 N.C. App. 224, 235, 770 S.E.2d 142, 150 (2015), which notes that “this Court has consistently found no plain error where a trial court has given the pattern jury instruction for the offense of obtaining property by false pretenses.” However, the portion of this Court’s decision in *Barker* relied on by the State is dicta, as this Court had already determined the trial court’s instructions in that case were not error based on *Ledwell* and *Clemmons*. *Id.* Moreover, we find the present case to be an exceptional case.

The State does not address defendant’s argument that the jury’s verdict would have been different had the trial court’s instructions included the specific misrepresentation alleged in the indictment. Upon review, we agree with defendant that absent the trial court’s error, it is likely the jury would have reached a different verdict for the obtaining property by false pretense charge. If the trial court’s instructions had limited the jury’s consideration to “filing a fire loss claim under the defendant’s home owner insurance policy, when in fact the defendant had intentionally burned her own residence,” it is unlikely the jury would have found defendant guilty because the jury found defendant not guilty of occupant or owner setting fire to a dwelling house. The instructions given by the trial court allowed the jury to consider any misrepresentation by defendant as a basis for a guilty verdict for obtaining property by false pretense. Furthermore, bearing in mind that

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the jury found defendant guilty of the lesser obtaining property by false pretense offense for which the value of the property acquired is not at issue, it is likely the jury's guilty verdict resulted from the consideration of defendant's misrepresentations regarding the personal items destroyed in the fire and rent money. Because the trial court's erroneous instructions allowed the jury to convict defendant on a theory not alleged in the indictment and it is unlikely the jury would have convicted defendant on the theory alleged in the indictment, we hold the error had a probable impact on the jury's finding defendant guilty of obtaining property by false pretense. The trial court plainly erred.

3. Insurance Fraud Instructions

[3] Similar to defendant's argument regarding the jury instructions for obtaining property by false pretense, defendant argues the trial court also erred in instructing the jury on insurance fraud because the trial court did not specify the false statement alleged in the indictment. Based on the instructions given, defendant contends the jury could have found her guilty based on any false statement that was material to the insurance claim. Because defendant did not object to the challenged instructions, our review is again limited to plain error, which defendant asserts.

The same fundamental principles of law cited above apply in the review of the insurance fraud instructions. "[D]efendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *Barnett*, 368 N.C. at 713, 782 S.E.2d at 888 (internal quotation marks and citation omitted). The trial court should not give instructions that allow conviction on theories not charged in the indictment, *Taylor*, 304 N.C. at 274, 283 S.E.2d at 777, and if the jury charge does not conform to the allegations in the indictment, there is a fatal variance, *Ross*, __ N.C. App. at __, 792 S.E.2d at 158.

The indictment for insurance fraud was similar to the indictment for obtaining property by false pretense in that the false statement alleged in the indictment was defendant's denial that she set fire to her residence. Specifically, the indictment for insurance fraud alleged as follows:

defendant . . . unlawfully, willfully and feloniously did with the intent to defraud and deceive an insurer, North Carolina Farm Bureau Mutual Insurance, present a written and oral statement as part of and in support of a claim for payment pursuant to an insurance policy, home owner's policy number HP5921697-01, knowing that the statements contained false and misleading information, *the defendant claimed that she had had nothing to do with the cause*

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of the fire when in fact, she set the fire and caused the dwelling to be burned, concerning a fact our [sic] matter material to the claim, all against the form of the statute in such case made and provided and against the peace and dignity of the State.

(Emphasis added). The trial court instructed the jury pursuant to pattern jury instruction N.C.P.I.–Crim. 228.30 without specifying the false or misleading statement alleged in the indictment, as follows:

[T]o find the Defendant guilty of this offense the State must prove five things beyond a reasonable doubt: first, that an insurance policy existed between Linda Locklear and the Estate of Linda Locklear and North Carolina Farm Bureau Mutual Insurance; second, the Defendant presented or caused to be presented a written or oral statement as part of or in support of a claim for payment or a benefit pursuant to the insurance policy; third, that the statement contained false or misleading information concerning a fact or matter material to the claim; fourth, the Defendant knew the statement contained a false or misleading information concerning a fact or material – matter material to the claim; fifth, that the Defendant acted with the intent to injure, or defraud, or deceive North Carolina Farm Bureau Mutual Insurance.

So I charge you that if you find from the evidence beyond a reasonable doubt that on or about the alleged date an insurance policy existed between Linda Locklear, Estate of Linda Locklear, and North Carolina Farm Bureau Mutual Insurance, and that the Defendant knowingly and with the intent to injure, or defraud, or deceive the North Carolina Farm Bureau Mutual Insurance presented or caused to be presented a statement that contained false or misleading information concerning a fact or matter material to the claim for payment of the claim pursuant to the policy or to obtain some benefit under the policy, it would be your duty to return a verdict of guilty. However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Both parties assert that defendant's challenge to the jury instructions for insurance fraud is substantially similar to her challenge above

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regarding the instructions for obtaining property by false pretense. Upon review, we agree the issues are substantially similar. Therefore, the analysis is the same and we reach the same result—because the trial court’s instructions allowed the jury to convict defendant of insurance fraud on a theory not alleged in the indictment and it is unlikely the jury would have convicted defendant on the theory alleged in the indictment, we hold the trial court’s instructions for insurance fraud were plain error.

B. Response to Jury Questions

In the final issue raised on appeal, defendant argues the trial court erred in responding to questions by the jury during deliberations. However, because we hold the trial court plainly erred in instructing the jury on the obtaining property by false pretense and insurance fraud charges, we do not address this last issue.

III. Conclusion

For the reasons discussed, we hold the trial court committed various errors in instructing the jury. The erroneous flight instruction was not prejudicial to defendant’s case. The erroneous instructions for obtaining property by false pretense and insurance fraud amount to plain error, entitling defendant to a new trial.¹

NEW TRIAL.

Judges STROUD and DAVIS concur.

1. Given that we have found the jury instructions were in error, we are sending the case back for a new trial. However, because the jury has already determined defendant was not guilty of burning the dwelling, we are unable to see a way the State can survive a motion to dismiss at the close of the State’s case should it choose to attempt to retry the case.

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STATE OF NORTH CAROLINA

v.

RAMELLE MILEK LOFTON

No. COA17-716

Filed 1 May 2018

**Indictment and Information—fatally defective indictment—
manufacture of controlled substance—intent to distribute**

Defendant's indictment for the manufacture of marijuana was fatally defective for failing to include the element of intent to distribute where the jury was given the option to convict based on multiple methods of manufacture, including preparation or compounding. N.C.G.S. § 90-95(a)(1) exempts preparation or compounding for personal use from the crime of manufacturing a controlled substance.

Appeal by Defendant from judgment entered 20 July 2016 by Judge Martin B. McGee in Superior Court, Wayne County. Heard in the Court of Appeals 22 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Allison A. Angell, for the State.

William D. Spence for Defendant.

McGEE, Chief Judge.

Ramelle Milek Lofton ("Defendant") was indicted 2 May 2016 on charges of manufacturing a controlled substance pursuant to N.C. Gen. Stat. § 90-95(a)(1), possession of marijuana, and possession of drug paraphernalia.¹ These charges arose out of events that occurred on 20 January 2015, when officers from the Goldsboro Police Department executed a search warrant for Defendant's residence. Defendant was tried at the 18 July 2016 criminal session of Wayne County Superior Court. The jury was instructed on possession of marijuana and drug paraphernalia, as well as manufacturing a controlled substance and the lesser included offense of attempting to manufacture a controlled substance. *See State v. Clark*, 137 N.C. App. 90, 96–97, 527 S.E.2d 319, 323 (2000) (attempt is a lesser included offense of the underlying charge).

1. In the indictment, the State erroneously cites N.C.G.S. § 90-95(a)(3) in support of the manufacturing charge.

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Defendant was found guilty on 20 July 2016 on the charges of attempting to manufacture a controlled substance and possession of marijuana. He was acquitted on the charge of possession of drug paraphernalia. Defendant appeals.

In Defendant's sole argument, he contends that "[t]he trial court erred in denying [his] motion to dismiss the charge of attempting to manufacture a controlled substance[.]" We agree, though on jurisdictional grounds not raised by Defendant.

We hold that the indictment charging Defendant with manufacturing marijuana was fatally defective.

"North Carolina law has long provided that '[t]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity.'" "[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of [subject matter] jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." This Court "review[s] the sufficiency of an indictment *de novo*."

State v. Harris, 219 N.C. App. 590, 593, 724 S.E.2d 633, 636 (2012) (citations omitted) (alterations in the original). Defendant was indicted on the manufacturing charge by the following relevant language:

[O]n or about the 20th day of January, 2015 in Wayne County, [Defendant] unlawfully, willfully and feloniously did manufacture a controlled substance in violation of the North Carolina Controlled Substances Act, by producing, preparing, propagating and processing a controlled substance. The controlled substance in question consisted of marijuana[.]

(Emphasis added).²

2. We note that the use of the conjunction "and," instead of "or," placed an additional burden on the State. The indictment as written required the State to prove that Defendant produced marijuana, prepared marijuana, propagated marijuana, *and* processed marijuana in order to prove that Defendant *manufactured* marijuana. As discussed in detail below, the relevant statute only requires the State to prove one basis – e.g. preparing marijuana – in order to sustain a charge of manufacturing marijuana. The State's use of the word "and" does not impact our jurisdictional analysis.

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N.C. Gen. Stat. § 90-95(a)(1) (2017) is the statute pertaining to the illegal manufacture of controlled substances:

N.C.G.S. § 90-95(a)(1) makes it unlawful to “manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance.” The intent of the legislature in enacting N.C.G.S. § 90-95(a)(1) was twofold: “(1) to prevent the manufacture of controlled substances, and (2) to prevent the transfer of controlled substances from one person to another.”

State v. Moore, 327 N.C. 378, 381, 395 S.E.2d 124, 126 (1990) (citation omitted). Our Supreme Court determined “the language of N.C.G.S. § 90-95(a)(1) creates three offenses: (1) *manufacture* of a controlled substance, (2) *transfer* of a controlled substance by sale or delivery, and (3) *possession with intent to manufacture, sell or deliver a controlled substance*.” *Id.* (emphasis in original). Therefore, a defendant may be indicted, separately, for manufacturing a controlled substance, transferring a controlled substance, or possessing with intent to manufacture or transfer a controlled substance. *Id.*

In *Moore*, the defendant was convicted of “selling” hallucinogenic mushrooms and “delivering” hallucinogenic mushrooms pursuant to a single transfer. *Id.* at 379-80, 395 S.E.2d at 125-26. Each of these convictions was treated as a separate offense. *Id.* Our Supreme Court held that, pursuant to N.C.G.S. § 90-95(a)(1), “selling” and “delivering” constitute two ways in which the crime of *transferring* a controlled substance may be proven, but that “selling” and “delivering” in this context did not constitute separate offenses for which a defendant may be convicted based upon a single transaction. *Moore*, 327 N.C. at 381, 395 S.E.2d at 126. Therefore, the Court in *Moore* held: “The jury in this case was improperly allowed under each indictment to convict the defendant of two offenses – sale and delivery – arising from a single transfer.” *Id.* at 383, 395 S.E.2d at 127. Because the defendant in *Moore* was convicted of both “selling” and “delivering” the same mushrooms in a single transaction, one of the defendant’s convictions based upon transferring a controlled substance was vacated. *Id.*

Our Supreme Court was careful to explain that its reasoning did not implicate issues of unanimity:

Our conclusion regarding the proper interpretation of N.C.G.S. § 90-95(a)(1) does not create a risk of a defendant being convicted by a nonunanimous verdict. The legislature intended that there be one conviction and punishment

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under the statute for defendants who transfer, *i.e.*, “sell or deliver,” a controlled substance. The transfer by sale or delivery of a controlled substance is one statutory offense, the gravamen of the offense being the transfer of the drug. So long as each juror finds that the defendant transferred the substance, whether by sale, by delivery, or by both, the defendant has committed the statutory offense, and no unanimity concerns are implicated.

Id. (citations omitted).

In the present case, Defendant was indicted for manufacturing marijuana in violation of N.C.G.S. § 90-95(a)(1). As with a charge of transferring pursuant to N.C.G.S. § 90-95(a)(1), a charge of manufacturing may be proven in multiple ways. N.C.G.S. § 90-95(a)(1) states:

(a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[.]

Relevant to this appeal, “manufacture” is defined by statute as follows:

“Manufacture” means the production, preparation, propagation, compounding, ... or processing of a controlled substance by any means, whether directly or indirectly, artificially or naturally[.] [However, “manufacture”] does *not include the preparation or compounding of a controlled substance by an individual for his own use*[.]

N.C. Gen. Stat. § 90-87(15) (2017) (emphasis added). Therefore, the State could have indicted Defendant on a *single* count of manufacturing marijuana, based on the *multiple* bases of production, preparation, propagation, or processing which, pursuant to *Moore*, could have been proven by evidence that Defendant *either* produced, prepared, propagated, or processed the marijuana. *Moore*, 327 N.C. at 383, 395 S.E.2d at 127. The fact that the jury could thereby convict Defendant based upon different *methods* of “manufacturing” – i.e. some jurors could find that Defendant produced marijuana, some could find that he prepared marijuana, some could find that he propagated marijuana, and some could find that he processed marijuana – does not raise any unanimity concerns.³

3. As noted above, because the indictment in this case used the language “producing, preparing, propagating and processing,” instead of “producing, preparing, propagating,

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However, Defendant's indictment for manufacturing marijuana is fatally flawed. Defendant was indicted pursuant to the "manufacturing" prong of N.C.G.S. § 90-95(a)(1) based upon the following relevant language: "[O]n or about the 20th day of January, 2015 in Wayne County, [Defendant] unlawfully, willfully and feloniously did manufacture a controlled substance in violation of [N.C.G.S. § 90-95(a)(1)], by producing, preparing, propagating and processing [marijuana]." Our Supreme Court has held that proof of intent to distribute is required by portions of the "manufacturing" prong of N.C.G.S. § 90-95(a)(1), stating that "the offense of manufacturing a controlled substance does not require an intent to distribute *unless* the activity constituting manufacture is *preparation* or *compounding*." *State v. Brown*, 310 N.C. 563, 568, 313 S.E.2d 585, 588 (1984) (emphasis added); *see also Id.*, (emphasis added) ("the plain language of [N.C.G.S. § 90-87(15)] makes it clear that these activities ["packaging," "repackaging," "labeling," and "relabeling"] are not included within the limited exception of those manufacturing activities (*preparation*, *compounding*) *for which an intent to distribute is required*"); *State v. Muncy*, 79 N.C. App. 356, 362, 339 S.E.2d 466, 470 (1986) (citation omitted) (emphasis added) ("intent to distribute is not a necessary element of the offense of manufacturing a controlled substance *unless the manufacturing activity is preparation or compounding*"). It is clear that intent to distribute is a required element if the manufacturing charge is based upon either preparation or compounding because preparation or compounding for personal use is specifically exempted under N.C.G.S. § 90-95(a)(1) and, therefore, the State must prove that a defendant's intent was not personal use, but distribution. *Id.*

In the present case, Defendant moved to dismiss the manufacturing charge based in part on the following argument:

Judge, we'd move to dismiss the allegation of preparation for a fatal defect in the indictment, which takes the jurisdiction from this [c]ourt. Judge, preparation, pursuant to General Statute[§ 90-87(15)], requires that the State charge preparation with the intent to distribute, intent to distribute being an essential element of that offense.

The trial court denied Defendant's motion to dismiss the manufacturing charge in its entirety, and instructed the jury on attempt to manufacture

or processing," the indictment as written required the State to prove all four of these bases in order to convict Defendant of manufacturing marijuana.

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marijuana on all four indicted bases: producing, propagating, processing, and preparing.

Because Defendant's indictment for the charge of manufacturing a controlled substance pursuant to N.C.G.S. § 90-95(a)(1) included preparation as a basis, it failed to allege a required element – intent to distribute. A valid indictment is a requirement for jurisdiction, and the fact that Defendant does not argue this issue on appeal does not relieve this Court of its duty to insure it has jurisdiction over Defendant's appeal. *Harris*, 219 N.C. App. at 593, 724 S.E.2d at 636; *State v. Helms*, 247 N.C. 740, 745, 102 S.E.2d 241, 245 (1958).

Because the State chose to allege four separate bases pursuant to which it could attempt to prove Defendant's guilt of the single count of manufacturing a controlled substance, it was necessary that *all four* of those bases were alleged with sufficiency to confer jurisdiction on the trial court for the manufacturing charge. Because one of those bases — “preparation” — required the unalleged element of “intent to distribute,” and the jury was instructed on all four bases alleged in the indictment, including “preparation,” the jury was allowed to convict Defendant on a theory of manufacturing a controlled substance that was not supported by a valid indictment. The omission of the element of intent from the indictment charging Defendant of manufacturing a controlled substance constituted a fatal defect. This Court cannot now, on appeal, isolate the defect in the indictment in a manner that does not taint the entire indictment.⁴ The fact that the indictment as written would have supported the charge of manufacturing a controlled substance had the State only included the underlying theories of “production,” “propagation,” and “processing” as bases for proving “manufacturing” does not save the indictment. Because the underlying basis of “preparation” was also alleged in the indictment and presented to the jury, “intent to distribute” became a necessary element of the manufacturing charge, and its absence constituted a fatal defect.

“An arrest of judgment is proper when the indictment wholly fails to charge some offense cognizable at law or fails to state some essential and necessary element of the offense of which the defendant is found guilty.” *Harris*, 219 N.C. App. at 593, 724 S.E.2d at 636 (quotation marks and citations omitted). “The legal effect of arresting the judgment is to

4. Because this issue is not before us, we do not consider whether the trial court could have cured the defect by allowing amendment of the indictment or only instructing the jury on the production, propagation, and processing theories of manufacturing a controlled substance alleged by the State.

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vacate the verdict and sentence of imprisonment below, and the State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment.” *Id.* (quotation marks and citations omitted). Because the indictment for the charge of manufacturing a controlled substance failed to include a necessary element of that crime as alleged by the State, the indictment failed to confer subject matter jurisdiction upon the trial court for that charge, and we vacate Defendant’s conviction for that charge. *Id.* at 598, 724 S.E.2d at 639. Defendant has not challenged his conviction for possession of marijuana, and that conviction is unaffected by this opinion.

NO ERROR IN PART, VACATED IN PART.

Judges DAVIS and TYSON concur.

STATE OF NORTH CAROLINA

v.

JONATHAN SANTILLAN

No. COA17-251

Filed 1 May 2018

1. Criminal Law—insufficient findings—motion to suppress—waiver of counsel—communication with law enforcement

The trial court failed to address key factual issues before denying defendant’s motion to suppress in a first-degree murder case involving a gang-related shooting at a residence. Without facts addressing communication between defendant and a law enforcement officer between the time defendant invoked his right to counsel and the time he agreed to waive his right to counsel, the appellate court cannot meaningfully determine whether the officer’s comments were reasonably likely to elicit an incriminating response from defendant.

2. Criminal Law—sufficient findings—waiver of counsel—voluntariness

The trial court’s findings of fact regarding defendant’s second waiver of his right to counsel were supported by competent evidence that the waiver was voluntary, and addressed the fact that defendant was fifteen years old at the time of the interrogation, among other factors.

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3. Evidence—character evidence—rap lyrics—prejudice

The trial court did not commit plain error by allowing the admission of rap lyrics written by defendant into evidence without objection. Sufficient other evidence was presented which made it unlikely the jury would have reached a verdict other than guilty.

4. Constitutional Law—effective assistance of counsel—not ripe for direct appeal

Defendant's argument that his counsel was ineffective for failing to object to the admissibility of rap lyrics written by defendant should be raised in a motion for appropriate relief where the record is silent regarding a possible strategic reason for not making an objection.

5. Sentencing—sufficiency of findings—mitigating factors—consecutive life sentences

The trial court failed to make findings stating the evidence supporting or opposing statutory mitigating factors before imposing two consecutive life sentences without parole.

Appeal by defendant from judgments entered 1 September 2015 and 12 October 2015 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 1 November 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Danielle Marquis Elder, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant.

DIETZ, Judge.

Defendant Jonathan Santillan appeals his convictions and sentences stemming from a gang-related home invasion in which Santillan and others murdered an innocent working couple. The victims lived in a home once occupied by a rival gang member who was the intended target. Santillan was fifteen years old at the time of the crime.

As explained below, the trial court's order denying Santillan's motion to suppress fails to address a key underlying fact: that a law enforcement officer communicated with Santillan between the time Santillan invoked his right to counsel and the time he agreed to waive his right to counsel. Without findings acknowledging and addressing the

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impact of that communication, this Court cannot meaningfully review whether Santillan's waiver of his right to counsel was voluntary. We therefore remand this issue to the trial court for further proceedings. We reject the remainder of Santillan's challenges to his convictions.

With respect to Santillan's sentence, the State concedes that the trial court failed to make sufficient findings to support the two sentences of life without parole. We therefore vacate those sentences and remand for a new sentencing hearing for those convictions, if one is necessary after the trial court resolves the issues concerning the suppression order.

Facts and Procedural History

On 5 January 2013, Maria Saravia Flores and Jose Mendoza Flores were shot to death in their home during a gang-related attack. The attackers kicked in the couple's front door and sprayed every room in the home with gunfire from an AK-47 rifle and a .45 caliber handgun. Mr. Flores was shot sixteen times while lying on the couch and Ms. Flores was shot seven times in the back and legs at the doorway to the kitchen.

The couple were not the intended targets of the shooting. They lived in a home previously occupied by a gang member named "Sancho." Sancho had been the target of a previous shooting by a rival gang member named "Trigger," who was accompanied by his brother, Moises, and two teenagers, Isrrael Vasquez and Defendant Jonathan Santillan.

At the time of this earlier shooting, Sancho refused to provide much information to law enforcement about his attackers. But after reports of the Floreses' killings, Sancho contacted law enforcement and told them he believed he was the intended victim. He explained that he had lived at that residence a year earlier, before the Floreses moved in, and "Trigger" had visited him when he lived there. Law enforcement contacted Trigger's girlfriend, who identified Moises, Vasquez, and Santillan as Trigger's associates, and informed police that they carried a .45 caliber handgun and an AK-47 rifle.

Police found Santillan and Vasquez in the attic of Vasquez's house and arrested them. After searching the attic, law enforcement also found an AK-47, a .45 caliber handgun, and several rounds of .45 caliber ammunition. The .45 caliber ammunition had scratch marks on the shell casings to obscure identifying information, and those scratch marks matched those found on casings at the Floreses' home and the earlier shooting involving Sancho.

On 15 January 2013, officers interrogated Santillan in four separate interviews over an eight-hour period. At the time, Santillan was fifteen

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years old. Santillan initially denied his involvement in both the Sancho shooting and the Floreses' killings, but later confessed to being present at the Sancho shooting. Santillan denied any involvement in the Floreses' killings, but he gave a detailed description of the murders and made a sketch of the Floreses' home based on information he claimed to have learned from Moises. Law enforcement videotaped each of the four interviews.

The State indicted Santillan on two counts of first degree murder, conspiracy to commit murder, first degree burglary, conspiracy to commit burglary, and possession of a firearm with altered serial number. At trial, the State sought to admit Santillan's videotaped interrogation and his sketch of the Floreses' home into evidence. Santillan moved to suppress this evidence on the ground that it was obtained in violation of his Sixth Amendment rights. The trial court denied the motion.

Over Santillan's objection, the trial court also admitted rap lyrics found in a notebook in Santillan's room. The lyrics describe someone "kick[ing] in the door" and "spraying" bullets with an AK-47.

The jury convicted Santillan on all charges. The trial court sentenced him to two consecutive sentences of life without parole and other, lesser sentences. Santillan timely appealed.

Analysis**I. Santillan's Motion to Suppress**

[1] Santillan first challenges the denial of his motion to suppress, arguing that the trial court's order lacks key findings concerning law enforcement's communications with him after he invoked his right to counsel. As explained below, we agree that the trial court's order did not address key factual issues and we therefore remand for the trial court to do so.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

"[D]uring custodial interrogation, once a suspect invokes his right to counsel, all questioning must cease until an attorney is present or the suspect initiates further communication with the police." *State v. Quick*, 226 N.C. App. 541, 543, 739 S.E.2d 608, 610 (2013). The questioning

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prohibited under this rule includes “not only express questioning, but also any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Id.* at 544, 739 S.E.2d at 611.

“Factors that are relevant to the determination of whether police should have known their conduct was likely to elicit an incriminating response include: (1) the intent of the police; (2) whether the practice is designed to elicit an incriminating response from the accused; and (3) any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion.” *State v. Fisher*, 158 N.C. App. 133, 142–43, 580 S.E.2d 405, 413 (2003), *aff’d*, 358 N.C. 215, 593 S.E.2d 583 (2004).

In *Quick*, for example, the defendant invoked his right to counsel. Later, an officer told him that the police had more warrants to serve on him, that an attorney would not be able to help with these new warrants, and that defendant would be served with the warrants regardless of whether the attorney was there or not. 226 N.C. App. at 544, 739 S.E.2d at 611. The defendant then responded, “We need to talk.” *Id.* at 542, 739 S.E.2d at 610. The officer again read the defendant his *Miranda* rights and the defendant signed a waiver form. *Id.* The trial court found that the officer knew or should have known his comments would elicit an incriminating response and therefore amounted to further questioning. This Court affirmed the trial court’s suppression order based on that finding. *Id.* at 544, 739 S.E.2d at 611.

By contrast, in *State v. Thomas*, the defendant invoked his right to counsel and the officer responded that “he should be sure and tell his attorney [that] he had a chance to help himself and did not do so.” 310 N.C. 369, 377, 312 S.E.2d 458, 463 (1984). Five minutes later, the defendant told the officer he wanted to make a statement and agreed to waive his right to counsel. *Id.* Our Supreme Court affirmed the denial of the motion to suppress, holding that “we are unable to conclude that [the officer] should have known that his ‘off-hand’ remark was reasonably likely to provoke defendant into making an incriminating statement.” *Id.* at 377–78, 312 S.E.2d at 463.

With this precedent in mind, we turn to the trial court’s suppression order in this case. As noted above, our review of the denial of a motion to suppress is strictly limited to the facts found by the trial court. *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619. In other words, “it is not our role to make factual findings, but rather, only to consider whether the trial

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court has engaged in the appropriate legal analysis, made findings of fact which are supported by competent evidence, and made conclusions of law supported by those findings.” *State v. Council*, 232 N.C. App. 68, 75, 753 S.E.2d 223, 229 (2014).

Here, the video recording of Santillan’s interrogation shows that Santillan initially waived his right to counsel and spoke to the officers. But, after lengthy questioning by law enforcement, Santillan re-invoked his right to counsel and the officers ceased their interrogation and left the room. During that initial questioning, law enforcement told Santillan they were arresting him on drug charges. The officers also told Santillan they suspected he was involved in the Floreses’ killings, but they did not tell him they were charging him with those crimes, apparently leaving Santillan under the impression that he was charged only with “drug possession.”

Then, before being re-advised of his rights and signing a second waiver form, Santillan engaged in the following exchange with Chief Johnson, who was standing outside the interrogation room:

SANTILLAN: Excuse me. Excuse me, sir. When can I make my phone call? When can I make my phone call?

CHIEF JOHNSON: In about two hours.

SANTILLAN: All right. So, what are—

CHIEF JOHNSON: (*Inaudible*) booked.

SANTILLAN: Huh?

CHIEF JOHNSON: You got to be booked.

SANTILLAN: What do you mean?

CHIEF JOHNSON: You’ve been arrested for a shooting.

SANTILLAN: I had nothing to do with that.

CHIEF JOHNSON: All right. You’ll be told. Hold on.

SANTILLAN: No, they already told me, but I already told them what I know.

CHIEF JOHNSON: Son, you f***** up.

SANTILLAN: I did?

CHIEF JOHNSON: You did.

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SANTILLAN: Nah, I didn't. So, they have to get transport? They're going to get transport? They're getting transport right now?

CHIEF JOHNSON: Oh, yeah.

SANTILLAN: All right. Thank you.

(Santillan sits back down.)

SANTILLAN: Aw, f*** this. I know (*inaudible*). F*** this, man. They better put me in protective custody, dog. (*Inaudible*).

Later, officers re-entered the interrogation room and Santillan told them that he again wanted to waive his right to counsel and make a statement.

The trial court's order does not address this exchange with Chief Johnson quoted above. The court's order finds that, during the initial interview, Santillan "read and reviewed a juvenile rights waiver form" and "eventually signed the rights form" before speaking to the officers. The court's findings do not expressly acknowledge that Santillan later invoked his right to counsel, at which point the officer ceased questioning him and left the room. But that finding can be inferred from the court's next finding, which notes that "[a]pproximately 40 minutes later, [Santillan] knocked on the door of the interview room and asked to speak with the investigators again. Investigator Scott Barefoot returned to the room with Chief Richard Johnson . . . and they explained that they cannot talk with him anymore unless he waives his rights. They then go through another juvenile rights waiver form . . . , which [Santillan] also signed."

These findings are insufficient for this Court to meaningfully review the trial court's legal conclusions. Because the trial court did not even address the exchange between Santillan and Chief Johnson in its findings, this Court cannot examine the relevant legal factors applicable to this exchange such as "(1) the intent of the police; (2) whether the practice is designed to elicit an incriminating response from the accused; and (3) any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion." *Fisher*, 158 N.C. App. at 142–43, 580 S.E.2d at 413.

When a trial court's order fails to resolve fact issues necessary to assess the trial court's legal conclusions, "an appellate court may remand the cause for appropriate proceedings without ordering a new trial." *State v. Lang*, 309 N.C. 512, 523–24, 308 S.E.2d 317, 323 (1983). We therefore remand this matter for a new suppression hearing with

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instructions for the trial court to address the exchange between Santillan and Chief Johnson in light of the relevant factors identified in this opinion. The trial court, based on those new findings, may again deny the motion to suppress, leaving Santillan's convictions intact, or may grant the motion to suppress in whole or in part and order a new trial. *See State v. Hammonds*, __ N.C. __, __, 804 S.E.2d 438, 441 (2017).

[2] Santillan also argues that, even ignoring Chief Johnson's communication with him, his second waiver was involuntary because of factors including his young age, the officers' interrogation tactics, and his lack of sleep, food, and medication. *See State v. Martin*, 228 N.C. App. 687, 691–92, 746 S.E.2d 307, 311 (2013). The trial court's order addressed these factors and, based on facts supported by competent evidence in the record, the court concluded that Santillan's "actions and statements show awareness and cognitive reasoning during the entire interview" and Santillan "was not coerced into making any statements, but rather made his statements voluntarily." Because the trial court's fact findings on these issues are supported by competent evidence, and those findings in turn support the court's conclusions, we reject these other challenges to the trial court's determination of voluntariness.¹

II. Admission of the Rap Lyrics

[3] Santillan next challenges the trial court's admission of rap lyrics found in a notebook in Santillan's room. The lyrics, which were written before the Floreses were killed, described someone "kick[ing] in the door" and "spraying" bullets with an AK-47 in a manner that resembled how the Floreses were killed. Santillan argues that the rap lyrics are irrelevant, prejudicial, and improper character evidence in violation of Rules 401, 403, and 404(b) of the North Carolina Rules of Evidence.

Santillan concedes that his trial counsel did not object to the admission of the rap lyrics and we therefore review the question of admissibility for plain error. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* In other words,

1. We recognize that some of these findings are relevant to assessing whether Chief Johnson's statements to Santillan were likely to elicit an incriminating response. The trial court may, but need not, supplement these findings on remand as well.

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the defendant must “show that, absent the error, the jury probably would have returned a different verdict.” *Id.* at 519, 723 S.E.2d at 335. In addition, plain error review is inapplicable to discretionary decisions of the trial court, such as a decision to exclude evidence under Rule 403. *State v. Cunningham*, 188 N.C. App. 832, 836–37, 656 S.E.2d 697, 700 (2008). We therefore limit our review to Santillan’s challenge under Rules 401 and 404(b).

Applying the plain error standard, we reject Santillan’s argument because he fails to show that, absent the alleged error, the jury probably would have returned a different verdict. The jury heard testimony establishing that the Floreses were murdered with a .45 caliber handgun and an AK-47 rifle; that Trigger’s girlfriend identified Santillan as someone who possessed those kinds of weapons; and that the attic where police found Santillan contained guns and casings matching those from the crime scene. Santillan also gave a statement to police from which the jury could infer his involvement in the killings.

Santillan categorically asserts that the rap lyrics had “enormous prejudicial effect,” but he does not explain why, had the rap lyrics not been admitted, the jury probably would have rejected the State’s other evidence and found Santillan not guilty. Accordingly, we hold that Santillan has failed to satisfy his burden to establish plain error.²

[4] Santillan also asserts that his counsel was ineffective for failing to object to the admissibility of this evidence. We decline to address this issue on direct appeal. This Court will address the merits of an ineffective assistance of counsel claim “when the cold record reveals that no further investigation is required.” *State v. Thompson*, 359 N.C. 77, 122–23, 604 S.E.2d 850, 881 (2004). Where the claim raises “potential questions of trial strategy and counsel’s impressions, an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues.” *State v. Stroud*, 147 N.C. App. 549, 556, 557 S.E.2d 544, 548 (2001). Our Supreme Court recently emphasized that

2. Because Santillan did not object to the lyrics’ *admission* into evidence, we have reviewed his objection for plain error. However, Santillan timely objected to the State’s request to *publish* the rap lyrics to the jury after they were admitted into evidence. The trial court’s decision to publish already-admitted evidence to the jury is a matter that rests within the trial court’s sound discretion. *State v. Harris*, 315 N.C. 556, 562, 340 S.E.2d 383, 387 (1986). Santillan has not shown that the court’s decision to publish this admitted evidence was an abuse of discretion—that is, an act “so arbitrary that it could not have been the result of a reasoned decision.” *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005).

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whether defense counsel “made a particular strategic decision remains a question of fact, and is not something which can be hypothesized” by an appellate court on direct appeal. *State v. Todd*, 369 N.C. 707, 712, 799 S.E.2d 834, 838 (2017).

Here, there is nothing in the record to indicate why Santillan’s counsel chose not to object to the admission of the rap lyrics, whether there was a valid strategic reason for that decision, or whether that decision was reasonable. Accordingly, we dismiss this claim without prejudice to pursue it in a motion for appropriate relief. *Thompson*, 359 N.C. at 123, 604 S.E.2d at 881.

III. Sentencing under N.C. Gen. Stat. §§ 15A-1340.19A-C

[5] Finally, Santillan argues that the trial court erred by imposing two consecutive sentences of life without parole without making sufficient fact findings. Specifically, Santillan argues that, although the trial court listed each of the statutory mitigating factors under N.C. Gen. Stat. § 15A-1340.19B(c), the court failed to expressly state the evidence supporting or opposing those mitigating factors as required by *State v. Antone*, 240 N.C. App. 408, 412, 770 S.E.2d 128, 130–31 (2015), and *State v. James*, __ N.C. App. __, __, 786 S.E.2d 73, 83–84 (2016). On appeal, the State concedes that the trial court erred by failing to make these findings.

We agree with the parties that the trial court’s findings are insufficient under *Antone* and *James*. We therefore vacate Santillan’s two sentences of life without parole and remand for a new sentencing hearing.

Santillan also challenges the constitutionality of N.C. Gen. Stat. § 15A-1340.19A *et seq.*, both facially and as applied to him. Because we vacate his two life sentences for insufficient factual findings, we need not address Santillan’s as-applied challenge, which may be mooted based on the trial court’s new findings or the new sentences imposed. Santillan’s facial challenge is precluded by this Court’s holding in *James*, but we acknowledge that it is preserved for further review in our Supreme Court if necessary. __ N.C. App. at __, 786 S.E.2d at 84.

Conclusion

In sum, we remand the trial court’s order denying Santillan’s motion to suppress for additional proceedings consistent with this opinion. We find no plain error with respect to Santillan’s evidentiary challenges and we dismiss Santillan’s corresponding ineffective assistance of counsel claim without prejudice to pursue that issue in a motion for appropriate

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relief. We vacate Santillan's two sentences of life without parole and remand for a new sentencing hearing with respect to those convictions, should that sentencing hearing be necessary following resolution of the remanded motion to suppress.

REMANDED IN PART; NO PLAIN ERROR IN PART; DISMISSED IN PART; VACATED AND REMANDED IN PART.

Judges ELMORE and INMAN concur.

STATE OF NORTH CAROLINA
v.
QUINCY JEROME SOLOMON, DEFENDANT

No. COA17-295

Filed 1 May 2018

**Evidence—relevancy—defendant's purported medical conditions—
second-degree murder—no foundation**

The trial court did not err by excluding defendant's testimony where defendant failed to provide the appropriate foundation regarding the relevancy of his purported medical conditions to his state of mind in a case involving a high-speed car chase that resulted in the death of his passenger.

Appeal by defendant from judgment entered 18 October 2016 by Judge Eric L. Levinson in Davidson County Superior Court. Heard in the Court of Appeals 5 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

BERGER, Judge.

On October 18, 2016, a Davidson County jury found Quincy Jerome Solomon ("Defendant") guilty of second degree murder and fleeing to elude arrest. Defendant appeals contending the trial court erred by excluding testimony regarding Defendant's purported diagnosed mental disorders. We disagree.

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Factual and Procedural Background

On the night of May 28, 2014, Defendant transported a group of his friends in his Mitsubishi Eclipse from Thomasville, North Carolina to a friend's home in High Point, North Carolina. Defendant was never issued a driver's license, and his privilege to drive was suspended in October 2013 due to a conviction for driving by a person less than twenty-one years old after consuming alcohol or drugs. Defendant's vehicle had no insurance, registration, or license plate.

After staying in Thomasville for approximately one hour, Defendant attempted to return to High Point with Keith Sheffield ("the victim") sitting in the front-passenger seat and Justin Walker ("Justin") sitting on the rear floor as there were no seats in the back of Defendant's vehicle. At that time, the Thomasville Police Department had established a license check station on National Highway. Around 1:00 a.m. on May 29, 2014, Sergeant Jason Annas observed Defendant's vehicle travel towards the license check station, crest over a hill, and make an illegal U-turn. Defendant traveled away from the license check station at a high rate of speed with a rear taillight out.

Officer Dustin Gallimore activated the lights and siren on his marked patrol car and pursued Defendant's vehicle heading northeast on National Highway. Officer Gallimore's patrol car reached speeds in excess of 100 miles per hour in a forty-five mile-per-hour zone in his effort to apprehend Defendant. During the seven-mile pursuit, Defendant: (1) drove his vehicle between fifteen and fifty-five miles per hour over the speed limit while driving through multiple residential areas where he passed both pedestrians and vehicles parked on narrow streets; (2) drove into a private driveway, turned around, and then drove towards the oncoming officer's patrol car while revving his engine; (3) drove left of the center lane and straddled the middle double yellow lines; (4) lost control of his vehicle on a curve in the road and went off of the road; (5) traveled at speeds of seventy to eighty miles per hour; (6) avoided stop sticks deployed by law enforcement; and (7) failed to stop at five stop signs during the pursuit. Defendant ultimately lost control of the vehicle and crashed into a ravine.

Officers arrived on scene shortly thereafter to find the vehicle upside down in the ravine, Justin standing behind the vehicle with a laceration to his arm, and Defendant on the ground holding the victim's head in his hands. Defendant told officers on scene, "This is all my fault. They were telling me to slow down and stop. I did not. I was driving. These other guys did not have anything to do with this. They were telling me to slow

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down and stop.” The victim died on May 31, 2014 from injuries sustained in the crash.

On June 2, 2014, Defendant was indicted by the Davidson County Grand Jury for second degree murder, speeding to elude arrest, and attempted assault with a deadly weapon on a law enforcement officer. The charge of attempted assault with a deadly weapon on a law enforcement officer was dismissed.

At trial, Defendant attempted to testify to his cognitive impairments and behavioral problems on direct examination. The State objected to Defendant’s testimony, arguing that Defendant had failed to provide notice of an insanity or diminished capacity defense, and he had failed to provide an expert witness or medical documentation for any of the purported conditions. On *voir dire*, Defendant testified that he suffered from several mental disorder including Attention Deficit Disorder (“ADD”), Attention Deficit Hyperactivity Disorder (“ADHD”), Pediatric Bipolar Disorder (“PBD”), and Oppositional Defiant Disorder (“ODD”). Defendant’s counsel stated they were not offering the testimony as a defense, but instead “offering it so the jury would be aware of [Defendant’s] condition and state of mind.”

The trial court determined that lay testimony from Defendant regarding his various purported mental disorders would not be allowed because it was not relevant pursuant to Rule 401 of the North Carolina Rules of Evidence. However, the trial court did allow Defendant to testify to his general behavioral issues and academic performance.

On October 18, 2016, the jury found Defendant guilty of second degree murder and fleeing to elude arrest. Defendant was sentenced to 162 to 207 months in prison for the second degree murder offense, and the trial court arrested judgment on the fleeing to elude arrest offense. Defendant gave notice of appeal in open court upon entry of final judgment.

Analysis

Defendant contends on appeal that the trial court erred by excluding Defendant’s testimony concerning his purported medical diagnoses as irrelevant under N.C. Gen Stat. § 8C-401, Rule 401. We disagree.

Although the trial court’s rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the

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existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the "abuse of discretion" standard which applies to rulings made pursuant to Rule 403.¹

Dunn v. Custer, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citations and quotation marks omitted).

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-401, Rule 401 (2017). "The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (citations and quotation marks omitted), *appeal dismissed and disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000).

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-701, Rule 701 (2017).

Defendant contends that informing the jury of his medical diagnoses would have been "helpful to [give a] clear understanding of his testimony or the determination of a fact in issue." *See id.* Specifically, Defendant argues it was essential that the jury hear evidence of Defendant's inability to comprehend the gravity of his actions and the danger that his conduct presented to the victim because of his purported medical diagnoses.

Defendant attempted to offer specific medical diagnoses through his own testimony to lessen his culpability or explain his conduct without any accompanying documentation, foundation, or expert testimony. Defendant's testimony regarding the relationship between his

1. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-403, Rule 403 (2017).

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medical diagnoses and his criminal conduct was not relevant without additional foundation or support. Such evidence would have required a tendered expert witness to put forth testimony that complies with the rules of evidence. Without a proper foundation from an expert witness and accompanying medical documentation, Defendant's testimony would not make a fact of consequence more or less probable from its admittance. *See* N.C. Gen. Stat. § 8C-401, Rule 401; *Griffin*, 136 N.C. App. at 550, 525 S.E.2d at 806.

Accordingly, we find no error in the exclusion of Defendant's opinion testimony regarding his medical conditions and its impact on his conduct as it was more confusing than helpful to the jury without further supporting evidence demonstrating its relevance.

Assuming, *arguendo*, the trial court improperly excluded Defendant's testimony under Rule 401, the purported error was not prejudicial against Defendant.

A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C. Gen. Stat. § 15A-1443(a) (2017); *see also State v. Lawrence*, 365 N.C. 506, 513, 723 S.E.2d 326, 331 (2012) (citation omitted) ("North Carolina harmless error review requires the defendant to bear the burden of showing prejudice."). Defendant has presented no evidence to indicate the likelihood that the jury would have reached a different verdict had the testimony been allowed. *See State v. Weeks*, 322 N.C. 152, 163, 367 S.E.2d 895, 902 (1988).

[T]o prove malice in second-degree murder prosecutions involving automobile accidents, it is necessary for the State to prove only that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind.

State v. Bethea, 167 N.C. App. 215, 218-19, 605 S.E.2d 173, 177 (2004) (citation, quotation marks, and brackets omitted). "[W]hat constitutes proof of malice will vary depending on the factual circumstances in each case." *Id.* (citation and quotation marks omitted). In North Carolina, our

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Supreme Court has recognized that “malice arises when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.” *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982) (citation omitted). “In the context of an automobile accident, this requirement [of malice] means that the State must prove that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind.” *State v. Mack*, 206 N.C. App. 512, 517, 697 S.E.2d 490, 493-94, *disc. review denied*, 364 N.C. 608, 704 S.E.2d 276 (2010) (citation and quotation marks omitted).

The State presented evidence that tended to show Defendant (1) drove while his license was suspended, (2) fled to elude law enforcement, and (3) drove at speeds nearly double the posted forty-five mile per hour speed limit. Defendant testified at trial: “There was a road block. I decided to turn around and leave. I decided because the car was not legal, the car had no tags, no insurance, and I don’t have a license because they suspended my license for drinking alcohol.” Defendant concedes there was sufficient evidence to submit the charge of second degree murder to the jury.

Further, Defendant admitted on cross-examination:

[The State]: Tell us about the stop sticks. You saw the stop sticks. You saw the blue lights and avoided those?

[Defendant]: Yes, ma’am. I saw the blue lights on the left-hand side of the intersection and the right-hand side of the intersection. The only way I saw the spikes, [the victim] said “spikes,” pointed them out to me. I went to the right side of the road, slowed down through the intersection, kept going.

[The State]: You kept going and you kept speeding and you lost control of the car again at Will Johnson Road?

[Defendant]: Yes, ma’am.

[The State]: And crashed into the ravine?

[Defendant]: Yes, ma’am.

[The State]: And [the victim] and Justin were asking you to stop, weren’t they?

[Defendant]: Yes, ma’am, after the first time. We sped out that first time. About 35 minutes down [the] road they

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asked me to stop and I told them I got you, meaning, that's slang for you know I'm going to do it.

[The State]: So you kept driving even though they asked you to stop?

[Defendant]: I was looking for a straight to pull over on. We was in that residential area. I didn't know which was streets or which was driveways.

. . . .

[The State]: You could have stopped back at the road block?

[Defendant]: I could have stopped, yes, ma'am, you are right.

[The State]: They asked you to slow down, too, didn't they?

[Defendant]: Yes, ma'am, and I did.

[The State]: You told the officers that you did it, you were responsible, nobody but me?

[Defendant]: That is true. I am responsible. I was the driver.

Defendant's testimony on cross-examination demonstrates that he understood and appreciated the increased risk that resulted from his conduct. Defendant admitted he was driving the vehicle without a license, intentionally did not stop for police, did not drive safely while in residential neighborhoods or on state roads, failed to stop at stop signs, and lost control of the vehicle several times. Defendant further admitted that he ignored his passengers' pleas to slow down and stop fleeing from law enforcement, knowing that his operation of the vehicle was extremely dangerous. *See Mack*, 206 N.C. App. at 517, 697 S.E.2d at 493-94. Defendant's testimony and statements showed he had the requisite "knowledge that injury or death would likely result" from his actions, satisfying the malice element of the crime charged. *Id.*

Accordingly, we hold that any possible error in the preclusion of Defendant's medical testimony would have been harmless because the State presented evidence tending to show malice through Defendant's conduct leading to the victim's death. *See id.* Defendant did not put forth evidence to satisfy the burden of showing prejudice from the trial court excluding his opinion testimony regarding specific medical diagnoses. *See Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331.

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Conclusion

Defendant received a fair trial free from error. The trial court did not err in precluding Defendant from testifying about his purported diagnosed mental disorders without documentation, evidence, or proper foundation. Furthermore, even if the trial court erred, the purported error was harmless.

NO ERROR.

Judges DAVIS and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
DOMINIC RASHAUN STROUD

No. COA17-762

Filed 1 May 2018

1. Indictment and Information—validity—spelling of middle name—race and date of birth—prejudice

An indictment was not fatally flawed as a result of misspelling defendant's middle name and misidentifying his race and date of birth. The minor spelling error of one letter did not prejudice defendant, and the erroneous race and date of birth information were mere surplusage that did not prejudice him.

2. Conspiracy—criminal—sufficiency of evidence—conspiracy to commit robbery with a dangerous weapon

There was sufficient evidence to convict defendant of conspiracy to commit armed robbery where defendant and two other individuals robbed the victim and defendant confirmed that the robbery was in retaliation for the victim previously having robbed the cousin of one of defendant's co-robbers.

3. Appeal and Error—appealability—preservation of issues—not raised at trial—witness's compelled appearance

Defendant waived his argument that a witness's compelled appearance at his trial for robbery violated his due process right to a fair trial where he failed to raise the issue at trial.

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[259 N.C. App. 411 (2018)]

Appeal by defendant from judgment entered 20 February 2017 by Judge Robert C. Ervin in Cleveland County Superior Court. Heard in the Court of Appeals 8 January 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Denise Stanford, for the State.

Anne Bleyman for defendant-appellant.

DAVIS, Judge.

In this appeal, we consider whether (1) the defendant's indictment was fatally defective because it misspelled his middle name and misidentified his race and date of birth; (2) the State presented sufficient evidence of an agreement between the defendant and another person to rob the victim in order to support a conspiracy charge; and (3) the defendant's right to due process was violated by the compelled appearance of the mother of his child as a witness for the prosecution. Dominic Rashaun Stroud ("Defendant") appeals from his convictions for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. After a thorough review of the record and applicable law, we conclude that Defendant received a fair trial free from error.

Factual and Procedural Background

The State presented evidence at trial tending to establish the following facts: On 4 January 2015 at approximately 5:00 p.m., Terry Maddox, Jr. went to Optimist Park in Shelby, North Carolina to meet a woman that he knew only through Facebook as "Shay." Following his arrival at the park, the two of them sat on benches in the picnic shelter area, and Maddox prepared to smoke marijuana that the woman had brought with her.

Maddox was suddenly struck on the head and fell to the ground. He saw two masked men holding firearms. One of them held a rifle, and the other possessed a handgun. One of the men told Maddox to remove his shoes, and he did so. The men then took his car keys, cell phone, and gold watch.

That afternoon, Officer Donald Bivins of the Shelby Police Department was dispatched to a house at 904 Hampton Street — which was located approximately 100 yards from Optimist Park — after dispatch received a call of "shots fired" in the area of the park. Upon entering the house, Officer Bivins and another officer observed a white

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male and a black male in the living room. The officers also encountered a black male sleeping in one bedroom and a white female lying on the floor of another bedroom.

As a means of securing the house, the officers instructed the occupants of the home to go into the living room. While in the living room, Officer Bivins observed a bullet from a rifle on the floor next to the couch. When he leaned down to inspect the bullet, he discovered that a rifle was also present underneath the couch. Officer Bivins further observed a second bullet located between the cushions of a loveseat in the living room. Behind the loveseat was a .9 millimeter Glock handgun that was not loaded. Under a blanket in the carport, Officer Bivins found a .45 caliber Glock handgun.

Officer Matthew Dyer of the Shelby Police Department was also dispatched to the Optimist Park area that evening. He encountered Maddox, who informed Officer Dyer that he could identify the persons who had robbed him. After coordinating with the officers at 904 Hampton Street, Officer Dyer took Maddox to the residence “for a show-up to identify the suspects that robbed him.” An officer stationed at the home directed three persons to step outside the house, and Maddox identified all three of the individuals as the persons who had robbed him. The persons identified by Maddox were Defendant, Abreanne LaShea Bowen (the mother of Defendant’s child), and Joey Raborn (a friend of Defendant). All three were placed into custody and taken to the Shelby Police Department for questioning.

Shortly thereafter, Bowen was interviewed by Detective Matt Styers of the Shelby Police Department. During the interview, she admitted that she was with Defendant at 904 Hampton Street prior to contacting Maddox and arranging a meeting with him at Optimist Park. She stated that she had set up the meeting in order to retaliate against Maddox for having previously robbed her cousin. Bowen told Detective Styers that she, Defendant, and Raborn had all been present at Optimist Park earlier that day. She further stated that when she saw Defendant and Raborn approaching the bench where she and Maddox were sitting she immediately ran back to the house at 904 Hampton Street.

Bowen also told Detective Styers that by the time Defendant and Raborn returned to 904 Hampton Street from Optimist Park “the police were already circling the block.” During his interview with Detective Styers, Defendant agreed to Bowen’s account of the events, stating: “That’s what happened. She said we did it for her cousin, so that’s what happened.”

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Detective Lee Farris also investigated the incident. He examined the picnic shelter area and found a small amount of marijuana, a .45 caliber shell casing, and a damaged gold watch.

Detective Farris subsequently executed a search warrant on the house located at 904 Hampton Street. Inside the residence, he discovered a piece of a gold watchband matching the damaged watch he had found at Optimist Park.

Defendant was indicted by a grand jury on 12 January 2015 for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. A jury trial was held beginning on 16 February 2017 before the Honorable Robert C. Ervin in Cleveland County Superior Court. At the close of the State's evidence, Defendant moved to dismiss both charges, and the trial court denied the motion. He renewed his motion to dismiss at the close of all the evidence, which was also denied.

On 20 February 2017, the jury found Defendant guilty of both charges. The trial court sentenced Defendant to a term of 72 to 99 months imprisonment. Defendant gave oral notice of appeal.

Analysis**I. Sufficiency of Indictment**

[1] In his first argument on appeal, Defendant contends that the trial court lacked jurisdiction to enter judgment against him because his indictment was fatally defective. He asserts that because the indictment misspelled his middle name and incorrectly identified his race and date of birth, it failed to “clearly and positively identify [Defendant] as the perpetrator of the charged offense.”

Defendant did not challenge the sufficiency of the indictment at trial. However, it is well-established that “when an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court.” *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208 (citation omitted), *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d. 548 (2001). We review the sufficiency of an indictment *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (citation omitted), *disc. review denied*, 362 N.C. 368, 661 S.E.2d 890 (2008).

This Court has held that “[a] valid bill of indictment is essential to the jurisdiction of the Superior Court to try an accused for a felony” *State v. Moses*, 154 N.C. App. 332, 334, 572 S.E.2d 223, 226 (2002) (citation omitted). An indictment “is constitutionally sufficient if it apprises the

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defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution of the same offense.” *State v. Jones*, 188 N.C. App. 562, 564, 655 S.E.2d 915, 917 (2008) (citation and quotation marks omitted).

In the present case, Defendant’s middle name was incorrectly spelled in the indictment as “Rashawn.” His actual middle name is “Rashaun.” Our Supreme Court has held that “[a]n indictment must clearly and positively identify the person charged with the commission of the offense.” *State v. Simpson*, 302 N.C. 613, 616, 276 S.E.2d 361, 363 (1981) (citation omitted). “The name of the defendant, or a sufficient description if his name is unknown, must be alleged in the body of the indictment; and the omission of his name, or a sufficient description if his name is unknown, is a fatal and incurable defect.” *Id.* (citation omitted).

In *State v. Higgs*, 270 N.C. 111, 153 S.E.2d 781 (1967), our Supreme Court held that minor mistakes in the spelling of a defendant’s name in an indictment do not — without more — render the indictment defective. *Id.* at 113, 153 S.E.2d at 782. In that case, the defendant’s given name was Burford Murriel Higgs. However, the indictment listed his name as Beauford Merrill Higgs. *Id.* In ruling that the indictment was sufficient, the Supreme Court concluded as follows:

On the trial, no point was made of the slight variance in the given names of *Beauford* and *Burford* and of the slight variance in the spelling of the middle name, and defendant will not now be heard to say that he is not the man named in the bill of indictment. Where defendant is tried without objection under one name, and there is no question of identity, he will not be allowed on appeal to contend that his real name was different.

Id. (citation and quotation marks omitted); *see also State v. Vincent*, 222 N.C. 543, 544, 23 S.E.2d 832, 833 (1943) (“Here, the two names, ‘Vincent’ and ‘Vinson,’ sound almost alike. . . . He was tried under the name of Vincent, without objection or challenge, and sentenced under the same name. There being no question as to his identity, he may retain the name for purposes of judgment.” (citation omitted)).

In the present case, the misspelling of Defendant’s middle name in the indictment differed by only one letter from the correct spelling. As shown above, our appellate courts have made clear that such minor spelling errors do not render an indictment defective absent a showing that the defendant was prejudiced by the error in preparing his defense.

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See Higgs, 270 N.C. at 113, 153 S.E.2d at 782. Defendant has made no such showing here.

In addition to the misspelling of his middle name, the indictment also contained two other mistakes. First, it listed his race as white despite the fact that he is black. Second, his date of birth was set out in the indictment as 31 August 1991 when, in fact, his correct birth date is 2 October 1991. Neither of these mistakes, however, caused Defendant's indictment to be defective.

"Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage." *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972). This Court has held that "a mistake in such information which is mere surplusage may be ignored if its inclusion has not prejudiced defendant." *State v. Sisk*, 123 N.C. App. 361, 366, 473 S.E.2d 348, 352 (1996) (citation omitted), *aff'd in part*, 345 N.C. 749, 483 S.E.2d 440 (1997).

In *State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981), the defendant argued that his indictment was fatally defective because it "described him as being a resident of Robeson County when in fact he resided in Columbus County." *Id.* at 43, 274 S.E.2d at 193. Our Supreme Court held that the indictment was sufficient despite the error.

Defendant's argument is, of course, frivolous. His residence is immaterial. General Statute 15A-924 requires a criminal pleading to contain the name or other identification of the defendant. The indictments contained defendant's name. The allegations as to his county of residence, if this is what was intended by the language in the indictment, is at most surplusage. Consequently any such error is not fatal.

Id. (internal citation, quotation marks, ellipsis, and brackets omitted).

Defendant concedes in his brief that no requirement exists that an indictment include the race or date of birth of a defendant. Instead, he argues, the "cumulative effect of these errors resulted in an indictment that was fatally defective for not clearly and positively identifying the person charged with the commission of the alleged offenses." We disagree.

As noted above, a valid indictment need only contain "[t]he name of the defendant, or a sufficient description if his name is unknown[.]" *Simpson*, 302 N.C. at 616, 276 S.E.2d at 363. Thus, the inaccuracies concerning his race and date of birth constitute "mere surplusage" that "may be ignored if its inclusion has not prejudiced defendant." *Sisk*, 123 N.C. App. at 366, 473 S.E.2d at 352 (citation omitted).

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Defendant makes no contention in this appeal that he was prejudiced in his ability to defend himself against the charges contained in his indictment as a result of these errors. Therefore, although admittedly the indictment was not a model of precision, we are satisfied that it was not fatally defective.¹

II. Denial of Motion to Dismiss Conspiracy Charge

[2] Defendant next argues that the trial court erred in failing to grant his motion to dismiss the charge of conspiracy to commit armed robbery with a dangerous weapon. He contends that the State presented insufficient evidence of the existence of an agreement between Defendant and another person to rob Maddox so as to allow this charge to be submitted to the jury.

“A trial court’s denial of a defendant’s motion to dismiss is reviewed *de novo*.” *State v. Watkins*, __ N.C. App. __, __, 785 S.E.2d 175, 177 (citation omitted), *disc. review denied*, 369 N.C. 40, 792 S.E.2d 508 (2016). On appeal, this Court must determine “whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator[.]” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citation omitted). Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State’s favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). “Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal.” *Smith*, 300 N.C. at 78, 265 S.E.2d at 169 (citation omitted).

A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. In order to prove conspiracy, the State need not prove an express agreement; evidence

1. Defendant’s alternative argument is that a fatal variance existed between his indictment and the evidence presented by the State at trial as a result of the inaccuracies discussed above. However, as the State notes, the Defendant did not raise this argument below. Therefore, he has waived appellate review of this issue pursuant to Rule 10(a) of the North Carolina Rules of Appellate Procedure. See N.C. R. App. P. 10(a)(1) (“In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.”).

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tending to show a mutual, implied understanding will suffice. This evidence may be circumstantial or inferred from the defendant's behavior.

State v. Shelly, 176 N.C. App. 575, 586, 627 S.E.2d 287, 296 (2006) (internal citations and quotation marks omitted). This Court has recognized that “[d]irect proof of conspiracy is rarely available, so the crime must generally be proved by circumstantial evidence.” *State v. Oliphant*, 228 N.C. App. 692, 703, 747 S.E.2d 117, 125 (2013) (citation and quotation marks omitted), *disc. review denied*, 367 N.C. 289, 753 S.E.2d 677 (2014).

In *Oliphant*, the defendants were convicted of conspiracy to commit robbery with a dangerous weapon. *Id.* at 694, 747 S.E.2d at 120. The evidence showed that they had approached the victim from behind as she walked alone late at night. *Id.* at 704, 747 S.E.2d at 125. One defendant held a gun while the other defendant took the victim's cell phone and pocketbook. In reviewing the sufficiency of the evidence to support the offense of conspiracy to commit armed robbery, we reasoned that the behavior of the defendants demonstrated “a mutual implied understanding that they would together approach the victim, and with the aid of a firearm, relieve her of her possessions[.]” *Id.* As a result, we held that sufficient evidence had been presented of a conspiracy to survive the defendant's motion to dismiss. *Id.*

State v. Young, __ N.C. App. __, 790 S.E.2d 182 (2016), involved two separate robberies committed in similar fashion that occurred in close geographic and temporal proximity to one another. *Id.* at __, 790 S.E.2d at 184-85. The evidence showed that the defendant — who was ultimately convicted of conspiracy to commit armed robbery — wore a blue bandana over his face and pointed a shotgun at the first victim while the defendant's accomplices took his car keys. *Id.* at __, 790 S.E.2d at 184. They then stole the victim's car and drove to a nearby apartment complex where the defendant robbed the second victim. *Id.* at __, 790 S.E.2d at 185. Both victims later identified the defendant from photo lineups as the person who had robbed them. *Id.* at __, 790 S.E.2d at 185. This Court held that the trial court did not err in denying the defendant's motion to dismiss the conspiracy charge, concluding that “[a]lthough the evidence is circumstantial, it does support the inference that defendant and [his accomplices] agreed to take [the first victim's] car and to go on to commit other unlawful acts, with defendant wielding the shotgun and another person driving the car.” *Id.* at __, 790 S.E.2d at 187.

In the present case, Maddox identified Defendant, Raborn, and Bowen as the individuals who had robbed him. Furthermore, Defendant

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confirmed to Detective Styers the accuracy of Bowen's pre-trial statement that the robbery at Optimist Park was in retaliation for Maddox having previously robbed Bowen's cousin.

Thus, sufficient evidence was offered at trial to establish Defendant's participation in a conspiracy to commit robbery with a dangerous weapon. Therefore, we hold that the trial court did not err in denying Defendant's motion to dismiss the conspiracy charge.

III. Due Process

[3] Finally, Defendant contends that Bowen's compelled appearance at trial as a witness for the State violated his "due process right to a fair trial under the Sixth and Fourteenth Amendments." Specifically, he argues that the prosecutor improperly coerced Bowen into testifying by threatening to charge her with obstruction of justice if she refused to do so and by the prosecutor also telling Bowen that she would make inquiries on Bowen's behalf regarding possible visitation with Bowen's son if she agreed to testify for the State.

It is well settled that constitutional issues "not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Garcia*, 358 N.C. 382, 415, 597 S.E.2d 724, 748 (2004) (citation and quotation marks omitted), cert. denied, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). There is no indication in the record that Defendant asserted this argument in the trial court. Therefore, we deem the issue waived. See *State v. Flippen*, 349 N.C. 264, 276, 506 S.E.2d 702, 709-10 (1998) (holding that defendant's failure to raise constitutional issue at trial waived appellate review of that question), cert. denied, 526 U.S. 1135, 143 L. Ed. 2d 1015 (1999). However, even had Defendant properly preserved the issue, his argument lacks merit.

"A defendant's sixth amendment right to present his own witnesses to establish a defense is a fundamental element of due process of law, and is therefore applicable to the states through the due process clause of the fourteenth amendment." *State v. Melvin*, 326 N.C. 173, 184, 388 S.E.2d 72, 77 (1990) (citation omitted). Our Supreme Court has stated that "[w]hether judicial or prosecutorial admonitions to defense or prosecution witnesses violate a defendant's right to due process rests ultimately on the facts in each case." *Id.* at 187, 388 S.E.2d at 79. However, "[w]itnesses should not be discouraged from testifying freely nor intimidated into altering their testimony." *Id.*

The prosecutor in *Melvin* repeatedly threatened two witnesses for the State with perjury in the days leading up to trial if they changed

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their testimony. *Id.* at 182-83, 388 S.E.2d at 76-77. He also engaged in a shouting match with the witnesses during which he grabbed one of them “by the arm, used profanity, and threatened [them] with jail if they changed their story.” *Id.* at 183, 388 S.E.2d at 77. Our Supreme Court held that the defendant’s due process rights had not been violated by the prosecutor’s conduct for two reasons: (1) the prosecutor’s actions did not prevent a witness “otherwise prepared to testify for a defendant, from doing so[;]” and (2) the prosecutor’s conduct did not “result in any of the witnesses testifying more favorably for the State than they otherwise would have.” *Id.* at 189-90, 388 S.E.2d at 81.

Conversely, this Court held in *State v. Mackey*, 58 N.C. App. 385, 293 S.E.2d 617, *appeal dismissed and disc. review denied*, 306 N.C. 748, 295 S.E.2d 761 (1982), that a new trial was required where a defense witness recanted his earlier testimony favoring the defendant after being threatened with perjury by a police detective and offered immunity by the District Attorney “if he would take the stand again and tell the truth.” *Id.* at 387, 293 S.E.2d at 618. We concluded that the witness’s “intimidation by a police detective and the offer of immunity by the District Attorney, who are symbols of the government’s power to prosecute offenders, likewise deprived defendant of due process of law.” *Id.* at 388, 293 S.E.2d at 619 (citation omitted).

Here, the following exchange took place between Bowen and the prosecutor at trial:

[PROSECUTOR]: Abreanne, is it fair to say you don’t want to be here?

[BOWEN]: Yes, it is, ‘cause I don’t.

[PROSECUTOR]: Did you and I have a conversation up in the jail?

[BOWEN]: Um-hmm (affirmative), and you basically told me if I didn’t get on the stand you was gonna criminally charge me with obstruction of justice.

....

[PROSECUTOR]: Abreanne, did I tell you that I could get you a visit with your son, or did I tell you I would ask?

[BOWEN]: You told me that you could get me a visit with my child and you would write the prison and ask them to get – you would write a report and ask them to give me game days.

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[PROSECUTOR]: I told you that I was in charge of visitation?

[BOWEN]: No, but you told me that you could possibly get me a visit with my son, yes.

Throughout her direct examination, Bowen either remained silent in response to the prosecutor's questions concerning the 4 January 2015 incident or simply stated that she did not want to answer the question. Ultimately, the State requested permission from the trial court to treat Bowen as a hostile witness and ask her leading questions. After the court granted her request, the prosecutor asked Bowen about her pre-trial statement to Detective Styers.

[PROSECUTOR]: And you told the officer that the three people in custody were the ones that did it, right?

[BOWEN]: (No audible response)

[PROSECUTOR]: Right, Abreanne?

[BOWEN]: Yes, ma'am.

[PROSECUTOR]: Okay, and [Defendant], even though he's the father of your baby, and you don't want to be here, he was one of the three, wasn't he?

[BOWEN]: (No audible response)

[PROSECUTOR]: He was one of the three, wasn't he?

[BOWEN]: (No audible response)

[PROSECUTOR]: Abreanne, can you tell the truth?

[DEFENSE COUNSEL]: Objection.

....

[PROSECUTOR]: Let me ask it this way. Did you tell the detective that interviewed you that [Defendant] was one of the three?

[DEFENSE COUNSEL]: Objection.

[THE COURT]: Do you recall telling the detective that?

[BOWEN]: No, ma'am.

[PROSECUTOR]: Okay, you don't recall that?

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[BOWEN]: (No audible response)

. . . .

[BOWEN]: I remember telling the detective that he didn't touch the guy's stuff or anything.

[PROSECUTOR]: You remember telling the detective that [Defendant] didn't touch the guy or his stuff?

[BOWEN]: Um-hmm (affirmative).

[PROSECUTOR]: How do you know that?

[BOWEN]: I remember telling him that.

[PROSECUTOR]: Okay. Is that true?

[BOWEN]: That I know of, yes, ma'am, because I took off running--

[PROSECUTOR]: Okay, that's right.

[BOWEN]: --as far as I know.

[PROSECUTOR]: So you don't know; is that right?

[BOWEN]: Yes, ma'am.

We reject Defendant's argument that Bowen's testimony resulted in a violation of his due process rights. Defendant does not assert that he intended to call Bowen as a defense witness but was prevented from doing so by the State. Furthermore, the circumstances surrounding Bowen's agreement to testify as the State's witness did not result in Bowen testifying more favorably for the State than she otherwise would have. *See Melvin*, 326 N.C. at 190, 388 S.E.2d at 81. To the contrary, as the above-quoted portion of her testimony makes clear, her testimony was largely unhelpful to the State. Accordingly, Defendant has failed to show a due process violation.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Chief Judge McGEE and Judge TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 MAY 2018)

ABDELJABAR v. KHALIL No. 17-667	Nash (13CVD1378)	Affirmed in Part, Reversed and Remanded in Part
AVERITT v. AVERITT No. 17-1206	Cumberland (16CVS379)	Affirmed
DYER v. ROTEN No. 17-671	Ashe (15CVD373)	Affirmed in part, vacated in part, and remanded
GRODENSKY v. McLENDON No. 17-1258	Durham (15CVS4722)	Affirmed
HOGUE v. CRUZ No. 17-122	Caswell (15CVS347)	Affirmed
HOLCOMBE v. OAK ISLAND AIRCRAFT HOUS., LLC No. 17-1081	Brunswick (15CVS2123)	Affirmed
HOPPER v. LAKESIDE MILLS, INC. No. 17-906	N.C. Industrial Commission (138346)	Affirmed
IN RE E.J.B. No. 17-1432	Onslow (16SP788)	Dismissed
IN RE I.G.M. No. 17-1065	New Hanover (15JT152)	Affirmed
IN RE S.W. No. 17-1297	Hoke (13JT56)	Vacated and Remanded
IN RE T.D.W. No. 17-1290	Cherokee (15JT1-3)	Vacated and remanded.
IN RE X.M.C. No. 17-1057	Davidson (15JT88-89)	Affirmed.
LEWIS v. LOWE'S HOME CTRS., LLC No. 17-1272	N.C. Industrial Commission (15-007878)	Affirmed
MADIGAN v. MADIGAN No. 17-468	Pitt (14CVD2596)	Affirmed

PRICE v. PASCHALL No. 17-1146	Durham (17CVS3591) (17CVS3592)	Affirmed
RADINGER v. ASHEVILLE SCH., INC. No. 17-1173	Buncombe (16CVS1102)	Affirmed
ROBERSON v. TR. SERVS. OF CAROLINA, LLC No. 17-1152	Wake (17CVS3620)	Affirmed
ROSS v. N.C. STATE BUREAU OF INVESTIGATION No. 17-794	N.C. Industrial Commission (TA-24836)	Affirmed
STATE v. BENNETT No. 17-986	Wake (15CRS1524) (15CRS207259)	NO ERROR AT TRIAL; REMANDED FOR NEW SENTENCING HEARING
STATE v. BROWN No. 17-1110	Mecklenburg (16CRS223504) (16CRS28102)	No Error
STATE v. LEWIS No. 17-1051	Johnston (14CRS55560) (14CRS55877)	Vacated and Remanded
STATE v. McALISTER No. 17-282	Yancey (16CRS181) (16CRS50269)	No Error
STATE v. MUHAMMAD No. 17-166	Wake (14CRS219793)	DISMISSED IN PART; NO ERROR IN PART
STATE v. PARKER No. 17-1067	Pitt (15CRS57593) (16CRS54467) (16CRS56962) (17CRS794)	Affirmed
STATE v. PEGUES No. 17-70	Guilford (15CRS23221) (15CRS76505)	No Error
STATE v. RAMIREZ No. 17-603	Durham (14CRS55312)	No Error
WILEY v. ARMSTRONG TRANSFER & STORAGE CO. No. 17-850	N.C. Industrial Commission (14-042875)	Affirmed

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